2006

The Paradox of Personality: Mental Illness, Employment Discrimination, and The Americans With Disabilities Act

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THE PARADOX OF PERSONALITY: MENTAL ILLNESS, EMPLOYMENT DISCRIMINATION, AND THE AMERICANS WITH DISABILITIES ACT

*by Deirdre M. Smith**

INTRODUCTION

Both medicine and the law devote considerable concern to drawing lines, that is, to classifying and making distinctions. In medicine, such line-drawing occurs when a person is designated healthy or ill, normal or disordered, appropriate for treatment or not. In the law, such line-drawing determines who bears legal responsibility in situations such as the commission of a crime, the termination of employment, or failure of a business deal. The line-drawing process, especially regarding social classifications, is always potentially problematic, and sometimes acutely so. This Article will consider one such acutely problematic process that involves both medical and legal practitioners.

Within their own realms, both medicine and the law attempt to distinguish between "mental illness" and "disfavored personality," that is, between being a person with a mental illness and one with certain personality traits and behaviors disfavored by those persons one encounters. However, both psychiatrists and courts have been unsuccessful in finding bright lines to follow in making that distinction. On the contrary, the line-drawing process is exceedingly thorny in both areas. In medicine, the pathologizing of personality is one of the most controversial and unsettled aspects of psychiatric labeling. In law, the implications of such labeling become simultaneously signif-

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icant and difficult under the Americans with Disabilities Act (ADA).[1] While society may pathologize noxious personalities, thus making them "disabilities," it is loath to extend disability-based legal protections to persons with such personalities. Rather, some commentators regard the extension of ADA legal protections to persons with such personalities as improperly removing or excusing their responsibility for their own behavior, while wrongly assigning legal responsibility to the persons who must interact with them. Thus, the invocation of "personality" in cases brought by persons alleging discrimination on the basis of "mental illness" causes a collision between societal and psychiatric attitudes towards certain psychological conditions and the law.

A review of personality in psychiatric and legal settings reveals that the dichotomy between illness and personality is not based upon empirical science; therefore, it is wholly susceptible to social construction and implementation. Courts rarely acknowledge this fact. Nonetheless, placing an individual's condition on one side of the line or the other can have significant consequences in courts' allocation of responsibility in employment discrimination claims.

Specifically, an excessively broad view of "mental illness" may overly limit the bases upon which the law permits employers to "discriminate" based on personality traits. By contrast, a restrictive view may insulate from review discrimination based upon the societal attitudes against mental illness that the ADA was designed to eradicate. Courts, by and large, have taken a more restrictive view of the meaning of "mental illness" and have employed approaches that ensure that personality issues are eliminated from ADA analyses. This approach has swept broadly, limiting the ADA's power to remedy past discrimination and to compel society to examine the place of people with mental illness in the workplace.

Part I of this Article provides an overview of psychiatry's debate regarding the status of "personality" as it relates to "mental disorders" and "mental illness" and discusses the debate's social and legal significance outside the ADA context. Parts II and III examine implications of the personality/mental illness dichotomy in the context of employment discrimination claims under the ADA. Part II first provides an overview of the ADA's framework for evaluating employ-

[1] Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12131–12134 (2000 ed. and Supp. II).

ment discrimination claims and then examines courts' struggle with personality's role in the ADA employment discrimination analysis in the context of cases involving adverse employment actions taken against employees seen as having noxious personalities (some of whom were specifically diagnosed with personality disorders). Part III examines the discussion in agency commentary and in the case law regarding the legality of using "personality" tests in the employment context. Part IV considers some implications of courts' conceptualization of personality's role in employment discrimination claims, and suggests a more reasoned approach. Finally, Part V concludes that, unless and until courts reverse the current trend of applying the ADA to systematically eliminate protection for those subject to discrimination based upon allegedly repugnant personalities, the ADA will never serve as an effective tool for advancing the civil rights of people with mental illness.

I. THE ROLE OF PERSONALITY IN THE DIAGNOSIS AND TREATMENT OF MENTAL ILLNESS

The elusive notion of "personality" occupies an unsettled place in the context of mental health diagnosis and treatment. While psychiatrists and other professionals in the field have long regarded personality as having some role in the evaluation and management of psychiatric disorders, they have never reached a consensus on what that role is or should be. To this day, psychiatrists cannot agree on whether and to what extent a person whose most prominent symptom is that of an inimical personality is actually mentally "ill." This controversy and its consequences are best demonstrated by tracing the evolution of "personality disorders" within psychiatry's diagnostic nomenclature and the resulting social and legal significance attached to such diagnoses.

A. Personality Pathology and Disorders

The diagnosis, classification and pathologization of human behavior, thoughts, and beliefs have had a complicated and often troubling history. Psychiatry and its notions of "mental illness" have been far from static. At times, society has found certain conduct so objectionable that society regards it as the manifestation of an "illness" or "sickness." Modern society now tolerates, or even condones, some of these

behaviors.[2] Alternatively, the act of ascribing pathology to conduct may be regarded as progressive because it recognizes that an illness "causes" certain conduct and lifts blame from the victim of the illness. The recognition of alcoholism as an illness is one example of such responsibility-shifting from the individual to the disease. In examining psychiatric labeling's history, many scholars have questioned whether the age of pathologizing disfavored behavior has passed or whether it accounts for much, or all, of psychiatric diagnoses today.[3] As one psychiatrist recently observed: "People have not changed biologically in the past 100 years"; what has changed is "the culture, our understanding of mental illness."[4] "Since mental illness is a widely accepted rationale for [the twin dangers of] relieving people of responsibility and depriving them of liberty," one commentator has reasoned, "the psychiatric is unavoidably political."[5] The political dimensions of mental illness diagnoses must be considered in any psychiatric-labeling analysis, and the history of the "personality disorder" exemplifies the role of sociopolitical attitudes in such labeling.

Although personality traits have long served as one basis for psychiatric classification,[6] psychiatrists did not attempt to specifically

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[2] EDWARD SHORTER, A HISTORY OF PSYCHIATRY FROM THE ERA OF ASYLUM TO THE AGE OF PROZAC 303 (1997) ("For two centuries, culture has been the swamp for psychiatry . . . ."). Until 1974, homosexuality was considered a mental illness by the American Psychiatric Association. *Id.* at 303–04. The diagnosis of "hysteria" was historically applied to behaviors by women that were considered abnormal or improper. *Id.* at 292 (noting that nineteenth century neurologists pathologized so much of women's behavior as to "make hysteria virtually coterminous with femininity"). Many of the behaviors that we now regard as a disorder's symptoms, such as obsessive-compulsive disorder or anorexia, were once ascribed religious significance (performed by those especially pious or close to God). Benedict Carey, *Who's Mentally Ill? Deciding is Often All in the Mind*, N.Y. TIMES, June 12, 2005, § 4, at 16. Other modern symptoms were previously regarded as evidence of sinful tendencies or even satanic possession. *Id.* (referring to observations made by Dr. Nancy Tomes, SUNY Stony Brook).

[3] *See infra* notes 52–68 and accompanying text.

[4] Carey, *supra* note 2 (quoting Laurence Kirmayer, M.D., McGill University).

[5] Jacob Sullum, *Thomas Szasz Takes on His Critics: Is mental illness an insane idea?*, REASONONLINE, May 2005, http://www.reason.com/0505/cr.js.thomas.shtml (last visited Jan. 28, 2007) (reviewing SZASZ UNDER FIRE: THE PSYCHIATRIC ABOLITIONIST TAKES ON HIS CRITICS (Jeffrey A. Schaler ed., 2004)).

[6] Within these debates, the proper place for notions of "personality" is unresolved. Personality classification is at least as old as Hippocrates, who theorized that all disease resulted from of an imbalance of the bodily humors—yellow bile, black bile, blood and phlegm—and identified four "temperaments": choleric, melancholic, sanguine, and phlegmatic. THEODORE MILLON ET AL., PERSONALITY DISORDERS IN MODERN LIFE 19 (2d ed. 2004). Since that time, several neurobiological and psychodynamic/psychoanalytic theories have developed to explain personality origin and development. *Id.* at 36. *See* ANNIE PAUL, THE CULT OF PERSONALITY:

identify personality disorders as distinct from psychoses, neuroses and mood disorders until the middle of the twentieth century. In his *History of Psychiatry*, Edward Shorter suggests that the development of "personality disorders" classification partly arose during World War II, when "[m]inor personality problems unremarkable in civilian life became of great importance in the military setting."[7] Still, psychiatry lacked a well-developed system to classify and understand behavior that was "essentially normal," but problematic to some degree in a person's interpersonal relations.[8] Further, as psychiatrists began to treat an increasing number of individuals outside of the institutional context,[9] they had a larger client population of patients with less severe forms of mental illness.[10]

The United States Government developed the "official categories" of persons for census purposes, which then became the first classification systems used by psychiatrists to describe persons with mental illness.[11] In 1917, the psychiatric field published its own diagnostic system, the *Statistical Manual for the Use of the Institutions for the Insane*.[12] In 1952, the first edition of the American Psychiatric Association's ("APA") *Diagnostic and Statistical Manual of Mental Disorders* ("DSM")[13] replaced the previous diagnostic system and is now widely regarded as the standard of psychiatric diagnosis in the United States.

Each successive volume of the DSM and its revisions provide a history of the evolution of psychiatric classification for the second half

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HOW PERSONALITY TESTS ARE LEADING US TO MISEDUCATE OUR CHILDREN, MISMANAGE OUR COMPANIES, AND MISUNDERSTAND OURSELVES 200 (2004) (describing current research using "brain-scan" devices to identify biological roots of personality).

7 SHORTER, *supra* note 2, at 298.

8 *Id.* at 291. The term "nosology" is often used to describe psychiatry's classification systems. *Id.* at 298.

9 Indeed, the treatment (and costs thereof) was another factor that influenced the DSM's development. As Bowker and Star note: "The DSM . . . is the lingua franca of the medical insurance companies." GEOFFREY C. BOWKER & SUSAN LEIGH STAR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES 47 (1999).

10 HERB KUTCHINS & STUART KIRK, MAKING US CRAZY 40 (2003).

11 *Id.* at 38. For example, at the time of the 1880 census, there were seven classifications of mental disease: mania, melancholia, monomania, paresis, dementia, dipsomania, and epilepsy. *Id.* at 38–39.

12 *Id.* at 39; SHORTER, *supra* note 2, at 298.

13 AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1952).

of the twentieth century.[14] The second edition of the DSM ("DSM-II") was published in 1968, largely to keep the manual aligned with the World Health Organization's *International Classification of Diseases*.[15] The number of disorders increased significantly with the release in 1980 of the third edition of the DSM ("DSM-III"), which represented a significant rewriting of the manual. A revised version of the DSM-III was published in 1987 ("DSM-III-R"), followed by the fourth edition of the DSM ("DSM-IV") in 1994. Most recently, the APA published the "text revision" of the fourth edition ("DSM-IV-TR"),[16] in 2000.[17]

The category currently referred to as "personality disorders" in the DSM-IV-TR experienced significant changes in the different editions of the DSM. The DSM-II devoted only a few pages to the cluster of "personality disorders," which were "characterized by deeply ingrained maladaptive patterns of behavior that are . . . life-long patterns, often recognizable by the time of adolescence or earlier."[18] The listed disorders included paranoid personality, cyclothymic personality, schizoid personality, explosive personality, hysterical personality,

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[14] Kutchins also demonstrates that the recent editions of the manual largely reflect the outcomes of political battles over diagnoses, rather than objective medical research. KUTCHINS & KIRK, *supra* note 10, at 16–20. *See also* SHORTER, *supra* note 2, at 303 ("Politics represented a final pothole on the high road of science for the DSM-III drafters. Even though they were struggling to cling to 'the data,' they were buffeted by ideological lobbies and forced to make a series of concessions. All this negotiating left the impression that what the drafts had created was as much a political document as a scientific one.").

[15] KUTCHINS & KIRK, *supra* note 10, at 40.

[16] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. text rev. 2000) ("DSM-IV-TR").

[17] Changes in the field of psychiatry itself can be tracked in the successive editions of the DSM. For example, there has been a marked shift away from psychoanalytic concepts in DSM's pages, including the complete removal from DSM-IV of the term "neurosis." SHORTER, *supra* note 2, at 305. The revisions also reflected social and political trends in society. *See* KUTCHINS & KIRK, *supra* note 10, at 55–99 (providing detailed history of the events leading up to the removal of the homosexuality diagnosis from DSM-III); SHORTER, *supra* note 2, at 301, 303–04 (commenting that the inclusion of anorexia nervosa in DSM-III seemed "highly ethnocentric," since it seems unlikely that anorexia nervosa would be found in other parts of the world and "if the DSM-III had been drafted in India, it would have included a big section on demonic possession"); KUTCHINS & KIRK, *supra* note 10, at 100–25 (describing the successful campaign waged by veterans of the Vietnam War for the inclusion of a diagnosis of Post-Traumatic Stress Disorder in DSM-III). *See also* BOWKER & STAR, *supra* note 9, at 47 ("A 'reverse engineering' of the DSM . . . reveals the multitude of local political and social struggles and compromises that go into a 'universal' classification.").

[18] KUTCHINS & KIRK, *supra* note 10, at 130.

antisocial personality, and inadequate personality.[19] In the editions since the DSM-II, the APA has added Narcissistic Personality Disorder, Dependent Personality Disorder, Masochistic Personality Disorder, Self-Defeating Personality Disorder, Passive-Aggressive Personality Disorder, and Borderline[20] Personality Disorder.[21] Other "personality disorders" have been dropped or reclassified in various editions of the DSM.[22]

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[19] *Id.* at 131.

[20] "Borderline Personality Disorder" has been subject to much attention and debate since its inclusion in DSM-III. *See* DANA BECKER, THROUGH THE LOOKING GLASS: WOMEN AND BORDERLINE PERSONALITY DISORDER, 49–86 (1991) (describing the origins of the term "borderline personality" and current controversies surrounding the concept's application). The term "borderline" does not indicate that the personality is on "the border" between two different conditions, although it appears that the condition evolved from what was previously thought to be "latent" or "borderline" schizophrenia. KUTCHINS & KIRK, *supra* note 10, at 177–78. Presently the term indicates an "unstable" personality. The condition has generated considerable controversy and is reputed to be the diagnosis most used when a therapist strongly dislikes his or her patient, or assigned after-the-fact when a patient and therapist have a sexual relationship. *Id.* at 199 ("'Borderline is a wastebasket diagnosis; the diagnosis is given to patients who therapists don't like, or who are troublesome or are hard to diagnose and treat.' . . . *Borderline* is a code word for trouble for the therapist.") (quoting personal communication with anonymous therapist); *see also* Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 279 (2000) ("The personality disorders, especially borderline personality disorder, often reflect little more than the diagnoser's intense dislike of the person diagnosed. Some clinicians have even suggested doing away with the diagnosis of borderline personality disorder because its connotations are so pejorative.") (citing Association of Therapeutic Communities, *The Need for an NHS Policy on Developing the Role of Therapeutic Communities in the Treatment of "Personality Disorder,"* Position Statement 3 (Sept. 1999)). *See also* KUTCHINS & KIRK, *supra* note 10, at 176–99 (providing a detailed recounting of the development of the diagnosis).

[21] KUTCHINS & KIRK, *supra* note 10, at 131.

[22] For example, "Sadistic Personality Disorder" was included with the release of DSM-III-R but dropped from the DSM-IV. *Id.* "Inadequate Personality Disorder" appeared in DSM-II but is not in DSM-IV-TR. *Id.* Kutchins documents the fiercely-waged battle over inclusion of a proposed "Masochistic Personality Disorder" in the DSM-III-R. *Id.* at 126–75. The debate's resulting compromise was the inclusion of a reference to "Self-Defeating Personality Disorder" in the appendix, but expressly disclaiming its status as an "official diagnosis in the classification." *Id.* at 165–67. There is no reference to the disorder in the DSM-IV-TR. *Id.* at 167. Similarly, the term "Multiple Personality Disorder," a diagnosis included in DSM-III and once part of common parlance, served as a favorite topic of books, movies and television while it was "epidemic" in the 1980s, SHORTER, *supra* note 2, at 291, but is now entirely gone from the DSM. It has been replaced with several types of Dissociative Disorders, which appear as their own category in the DSM-IV-TR, characterized by "disruption in the usually integrated functions of consciousness, memory, identity, or perception." DSM-IV-TR, *supra* note 16, at 519–33. The diagnoses and associated concepts of the condition (such as whether one can actually have "multiple personalities") remain controversial and unsettled. *See, e.g.,* JOAN ACOCELLA, CREATING HYSTERIA: WOMEN AND MULTIPLE PERSONALITY DISORDER (1999). It is unclear whether,

The DSM-IV-TR describes a Personality Disorder as "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment."[23] Classification of personality disorders is rather nuanced. The DSM-IV-TR groups the ten different specific disorders[24] into three "clusters" based upon "descriptive similarities," meaning their outward appearances to others (not necessarily diagnosticians):

> Cluster A includes the Paranoid,[25] Schizoid,[26] and Schizotypal[27] Personality Disorders. Individuals with these disorders often appear odd or eccentric.
>
> Cluster B includes the Antisocial,[28] Borderline,[29] Histrionic,[30] and Narcissistic[31] Personality Disorders. Individuals with these disorders often appear dramatic, emotional, or erratic.
>
> Cluster C includes the Avoidant,[32] Dependent,[33] and Obsessive-Compulsive[34] Personality Disorders. Individuals with these disorders often appear anxious or fearful.[35]

The DSM-IV-TR editors caution: "Personality Disorders must be distinguished from *personality traits that do not reach the threshold for a Personality Disorder*."[36] Rather, the diagnosis of "disorder" is

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despite its name, multiple personality disorder has ever been considered a *personality* disorder *per se*.

23 DSM-IV-TR, *supra* note 16, at 685.

24 The DSM-IV-TR editors note that there is a diagnosis of "Personality Disorder Not Otherwise Specified," for individuals who meet the "general criteria" for personality disorders and have either traits from several of the enumerated personality disorders or a personality disorder that is not included in the DSM's classification (the provided example is "Passive-Aggressive Personality Disorder"). *Id.*

25 See *infra* at 150 for listing of specific diagnostic criteria.

26 See *infra* at 150 for listing of specific diagnostic criteria.

27 See *infra* at 151 for listing of specific diagnostic criteria.

28 See *infra* at 152 for listing of specific diagnostic criteria.

29 See *infra* at 152 for listing of specific diagnostic criteria.

30 See *infra* at 153 for listing of specific diagnostic criteria.

31 See *infra* at 153 for listing of specific diagnostic criteria.

32 See *infra* at 154 for listing of specific diagnostic criteria.

33 See *infra* at 155 for listing of specific diagnostic criteria.

34 See *infra* at 155 for listing of specific diagnostic criteria.

35 DSM-IV-TR, *supra* note 16, at 685–86.

36 *Id.* at 689 (emphasis in original).

reserved for those traits that are "inflexible, maladaptive, and persisting and cause significant functional impairment or subjective distress."[37]

However, the notion of personality *trait*—"a long-standing pattern of behavior expressed across time and in many different situations"[38]—is not easily separable from that of a personality *disorder*. Theodore Millon, one of the leading psychologists to develop the modern DSM classifications of personality disorders, characterizes such disorders as conditions in which several personality traits typically occur together.[39] Scholars have noted that this differentiation between the "manifest symptomatic picture" of a disorder and the "personologic system that undergirds it" dates back to Socrates, Plato and earlier.[40] Thus, traits are not synonymous with disorders, but the disorders are characterized by specific traits.

This illness/personality dichotomy is also reflected in the DSM's separation of Personality Disorders from other mental disorders in its "multiaxial" approach to psychiatric diagnoses.[41] "Traditional" mental disorders, referred to as "clinical syndromes" (including mood, thought, and anxiety disorders) are listed under Axis I,[42] while "abnormalities of temperament" (personality disorders) are placed under Axis II. Axis II disorders are considered "long-standing and pervasive" and resistant to brief treatment.[43] The segregation of the personality disorders under the multiaxial approach "ensured that the more enduring and often more prosaic styles of personality function-

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37 *Id.*

38 MILLON, PERSONALITY DISORDERS, *supra* note 6, at 3.

39 For example, those persons identified as having Antisocial Personality Disorder ("Antisocials") are often "manipulative, reckless, aggressive, irresponsible, exploitative and lacking in empathy and remorse." MILLON, PERSONALITY DISORDERS, *supra* note 6, at 3. For diagnosis, a person need only demonstrate a bare majority of the traits listed for the particular disorder.

40 THEODORE MILLON, MASTERS OF THE MIND: EXPLORING THE STORY OF MENTAL ILLNESS FROM ANCIENT TIMES TO THE NEW MILLENNIUM 21 (2004).

41 This approach, introduced in DSM-III, requires evaluation and diagnoses to occur along five separate axes. In addition to Axis I (Clinical Disorders) and Axis II (Personality Disorders and Mental Retardation), diagnosticians are to indicate "General Medical Conditions" potentially related to the individual's mental disorders (Axis III), the presence of "Psychosocial and Environmental Problems" (Axis IV), and the individual's placement on the 100-point Global Assessment of Functioning ("GAF") scale, which rates the overall level of functioning (Axis V). DSM-IV-TR, *supra* note 16, at 27-34; *see also* KUTCHINS & KIRK, *supra* note 10, at 270 n.41.

42 MILLON, MASTERS OF THE MIND, *supra* note 40, at 193.

43 *Id.* at 116.

ing would not be overlooked when giving attention to the frequently more urgent and behaviorally dramatic clinical syndromes."[44]

The DSM editors regarded personality disorders as conditions separate from "traditional mental disorders," a view that finds support in Millon's caution that, although the DSM includes personality disorders (ostensibly in a listing of "mental disorders"), they are not "discrete medical diseases."[45] The "causal assumptions" underlying Axis I and Axis II diagnoses differ because the causes of Axis I disorders are "localizable," whereas the causes for the personality disorders are "literally everywhere . . . from every domain of functioning."[46] Personality disorders are more analogous to an impairment of the immune system, rather than a disease itself.[47]

While personality disorders are often regarded differently from other mental disorders, the inclusion of personality disorders in the DSM's definitive listing of psychiatric disorders conveys the message that psychiatry regards those persons with personality disorders to be "ill" in certain respects. Thus, psychiatry has established an ambiguous place for personality disorders within that field. As discussed below, this internal ambiguity has implications reaching the treatment setting.

B. The Significance of a Personality Disorder Diagnosis

Psychiatry does not classify in a vacuum. Diagnosticians are part of society as a whole and their attitudes both reflect and influence societal attitudes through psychiatric labeling. The socio-legal implications flowing from psychiatric diagnoses shape the extent to which we assign responsibility to persons for their behavior. Personality disorders provide an especially stark example of this feedback loop between psychiatry, the legal system, and society at large.

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[44] *Id.* at 193.

[45] MILLON, PERSONALITY DISORDERS, *supra* note 6, at 9.

[46] *Id.* at 9–10.

[47] *Id.* at 8–10. Researchers in the fields of psychology and psychiatry have sought to determine whether there is a physiological or genetic etiology to personality disorders, which has been found to some degree with depression, bipolar disorder, and schizophrenia, but the studies have not yielded any conclusive findings. *See, e.g.*, BECKER, *supra* note 20, at 61–62 (noting the increasing number of studies seeking links between personality disorders and "a biologically-defined concept of affective disorders") (quoting J.K. KROLL, THE CHALLENGE OF THE BORDERLINE PATIENT: COMPETENCY IN DIAGNOSIS AND TREATMENT 25 (1988)). *See also* Bruce Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534, 560–63 (1995).

1. The Social Significance

Elizabeth Emens observed that people discriminate against those with mental illness because of the way they make the rest of us feel; there is an imposition of "hedonic costs," which she defines as "an increase in negative emotions or a loss of positive emotions."[48] Emens notes that "[r]esearch on emotional contagion suggests that people with mental illness are likely to cause others to share their negative emotions."[49] However, our own negative reactions to certain persons may be what lead us to label them with mental illness in the first place.[50]

Herb Kutchins and Stuart Kirk, social work scholars and leading critics of the DSM have commented:

> Part of the power of DSM derives from its attempt to distinguish mental disorder from other human troubles. Although to some lay-people the importance of the distinction may not be immediately clear, it is an enormously consequential one. DSM is a claim for professional jurisdiction by the American Psychiatric Association. The broadness of this claim provides justification for the scope of psychiatric expertise and a basis for requests for governmental and private support. But is does more: it proposes how we as a society should think about our troubles. By creating categories for certain behaviors, DSM determines which behaviors should be considered a result of illness or disorder and should therefore fall under the purview of psychiatrists and other mental health professionals. . . . DSM is a guidebook that tells us how we should think about manifestations of sadness and anxiety, sexual activities, alcohol and substance abuse, and many other behaviors. Consequently, the categories created for DSM reorient our thinking about important social matters and affect our social institutions.[51]

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[48] Elizabeth Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 401 (2006).

[49] *Id.*

[50] Emens acknowledges that an examination of what constitutes a "mental illness" is outside the scope of her article and instead explains that she defined mental illness for purposes of her argument largely along the lines of the diagnostic criteria of the DSM-IV-TR for those considerations "typically thought of as psychological disorders, such as mood, anxiety, thought and personality disorders . . . ." *Id.* at 403.

[51] KUTCHINS & KIRK, *supra* note 10, at 11. *See* Jules B. Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 RUTGERS L. REV. 377, 394–423 (1987) (arguing that the "mental health legal system" should adopt the "medical model" of mental illness, including the

Although the DSM diagnoses bear the stamp of "objective" medical expertise, they are particularly prone to the social dimensions of classification; they are "in part social constructions and cultural artifacts."[52] Thus, using such diagnoses may be seen as circular or reinforcing social attitudes: "Disorders are what doctors treat, and what doctors treat is defined by implicit social standards."[53] Society grants enormous deference to professionals employing such diagnoses, even when the diagnoses implicate one's liberty and legal status.[54]

British historian Roy Porter observes in his history of mental illness: "It is not only cynics who claim that politico-cultural, racial, and gender prejudices still shape the diagnosis of what are purportedly objective disease syndromes."[55] Noting that the DSM has grown from 134 to 943 pages, Porter comments: "More people than ever seem to be diagnosed as suffering from more psychiatric disorders than ever: is that progress?"[56]

The validity and reliability of psychiatric diagnosis remains controversial,[57] which appears particularly true regarding the appropriate-

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DSM diagnostic criteria, to determine which mental illnesses may serve as a basis for invoking the insanity defense and for evaluating whether a specific individual has a mental illness).

52 MILLON, PERSONALITY DISORDERS, *supra* note 6, at 11.

53 *Id.*

54 *See* Winick, *supra* note 47, at 554–55.

> The vagueness and breadth of the concept of mental illness in many legal contexts raises grave problems, particularly when the legal rules in question effect a deprivation of liberty. The imprecision of statutory criteria in effect allows clinicians who perform evaluations for the courts in these contexts the power to make decisions that in a democracy should be made by the legislature. Moreover, their breadth and imprecision both allow and mask arbitrariness and discrimination in the application of the law. It is time for the law itself to define mental illness for legal purposes instead of incorporating clinical notions of the concept. *Id.*

55 ROY PORTER, MADNESS: A BRIEF HISTORY 214 (2002). *See also* BRADLEY LEWIS, MOVING BEYOND PROZAC, *DSM*, AND THE NEW PSYCHIATRY: THE BIRTH OF POSTPSYCHIATRY (2006) (using postmodern and poststructuralism approaches to argue that mainstream psychiatry has increasingly sought to establish its place as an objective, atheoretical "science" while denying its cultural basis).

56 PORTER, *supra* note 55, at 214.

57 *See* Ansar M. Haroun & Grant H. Morris, *Weaving a Tangled Web: The Deceptions of Psychiatrists*, 10 J. CONTEMP. LEGAL ISSUES 227, 238–40 (1999) (observing that psychiatrists are encouraged by a variety of influences, including legal standards and insurance reimbursement, "to find mental disorder in virtually everyone they see"); *see also* Lars Noah, *Pigeonholing Illness: Medical Diagnosis as a Legal Construct*, 50 HASTINGS L.J. 241, 295 (1999) (noting that a health care provider may engage in "diagnostic dishonesty" due to a variety of motivations, including both "economic advocacy" and "forensic advocacy" on behalf of the patient).

ness of diagnoses of personality disorders.[58] The DSM-IV-TR reports that personality disorders occur with significant prevalence in American society.[59] Who are these disordered personalities? A leading critic of psychiatric labeling, Thomas Szasz, notes that, "the very persons whom psychiatry labels with the term 'personality disorders' are the same persons called bad or deviant, sinning or loathsome. . . . Those with personality disorders make up a large percentage of people in jails, on welfare rolls, and in the general practitioner's waiting rooms."[60] These individuals have mental illnesses, or are classified as such, solely because they are "functionally disabled."[61] Szasz observes that persons identified as having personality disorders especially resist psychiatric "treatment" because they do not feel that they have a disorder,[62] despite possessing the "peculiar capacity to get under the skin of others."[63]

Edward Shorter's *History of Psychiatry* summarizes the state of personality disorders succinctly:

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[58] The variability of these diagnoses is evident in an employment decision of the Sixth Circuit, Turner v. City of University Heights, No. 89-3489, 1999 U.S. App. LEXIS 22246 (6th Cir. Sept. 9, 1999). The plaintiff was described by a treating psychologist as "confrontational, hot-tempered, and inappropriately argumentative." *Id.* at *3. A second psychologist, who reviewed the plaintiff's records and conducted an examination, concluded that the plaintiff had a paranoid personality disorder. *Id.* at *6. However, a psychiatrist who conducted an evaluation "opined that Turner did not meet *any* criteria for *any* psychiatric disorder," although she nonetheless noted that he posed an unspecified "low-risk danger to himself and others." *Id.* at *6–*7 (emphasis added). The court affirmed the district court's entry of summary judgment for the defendant on the plaintiff's disability discrimination employment claim and reasoned that the plaintiff failed to demonstrate that he was qualified for the position in light of the psychiatrist's observation that he posed some risk of harm if he returned to work. *Id.* at *15–*16.

[59] The DSM-IV-TR provides the following figures regarding the prevalence of personality disorders in the United States: Paranoid (.5–2.5% general population, 10–30% in inpatient psychiatric settings, and 2–10% outpatient psychiatric settings); Schizoid ("uncommon" in clinical settings); Schizotypal (3% general population); Antisocial (3% males and 1% females in community samples and 3–30% in clinical settings); Borderline (2% of general population, 10% outpatient and 20% inpatient psychiatric settings; ranges 30–60% of those with personality disorders); Histrionic (2–3% general population and 10–15% in inpatient and outpatient settings); Narcissistic (1% in general population and 2–16% in clinical population); Avoidant (.5–1% in general population and 10% outpatient clinical settings); Dependent ("among the most frequently reported Personality Disorders encountered in mental health clinics."); Obsessive-Compulsive (1% community samples and 3–10% clinical settings). DSM-IV-TR, *supra* note 16, at 692–728.

[60] THOMAS SZASZ, INSANITY: THE IDEA AND ITS CONSEQUENCES 110 (1987).

[61] *Id.*

[62] *Id.* at 111.

[63] *Id.* (quoting G.E. Vaillant and J.C. Perry, *Personality Disorders*, *in* 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1562 (H.I. Kaplan, A.M. Freedman, et al. eds. 1980)).

> Personality disorders have become a whole sandbox for empire building. Although the concept of a disorder of the personality—in which everybody suffers but the patient—remains scientifically rather murky, in practice imputed personality disorders have taken off.[64]

He cautions that "the entire notion of giving patient-status to people because they are troublesome to others represent[s] a pathologizing of essentially normal if irksome behavior."[65] Shorter comments that many of the apparently newly-discovered personality disorders represented nothing more than exaggerated familiar character traits developed over each successive volume of the DSM.[66]

The "personality disorders" category seems to be where psychiatric classification places those behaviors and actions that psychiatrists and American society disfavor.[67] Shorter concludes that these personality diagnoses, as well as the other ballooning disease labels, substantially lowered the threshold for labeling someone "ill."[68]

2. *The Legal Significance*

Psychiatry's unsettled controversy over the nature and significance of a personality disorder diagnosis, and the consequent legal

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[64] SHORTER, *supra* note 2, at 291.

[65] *Id.*

[66] *Id.*

[67] For example, the original 1952 DSM edition included homosexuality under "Sexual Deviation" and classified it as a "personality disorder." In 1980, DSM-III dropped the classification. KUTCHINS & KIRK, *supra* note 10, at 57. In general, the APA continues to tinker with the place of personality disorders within psychiatric diagnosis and the DSM. The "research agenda" for the DSM-V, due out in 2010, acknowledges "notable dissatisfaction with the current conceptualization and definition of the DSM-IV-TR personality disorders" and observes that problems with Axis II diagnoses indicate the "most important gaps in the DSM-IV.". A RESEARCH AGENDA FOR DSM-V 123–124 (Kupfer et al., eds. 2002) *available at* http://www.appi.org/pdf/kupfer_2292.pdf (last visited on Nov. 25, 2006); *see also* Michael B. First, M.D., *Dimensional Models of Personality Disorders: Etiology, Pathology, Phenomenology, and Treatment*, *available at* http://dsm5.org/conference3.cfm (last visited on Nov. 25, 2006) (reporting on the outcome of the APA's Personality Disorders Conference, held as part of the DSM-V's development and the work to create a "dimensional" rather than "categorical" approach to the diagnosis of personality disorders).

[68] SHORTER, *supra* note 2, at 291. For example, the diagnosis of borderline personality disorder, see *supra* note 20, introduced in the DSM-III, is now one of the most popular diagnoses in psychiatry. Carey, *supra* note 2. Millon has described the diagnosis as follows: "This is [sic] seems to me to a kind of diagnosis for our age, this complex, changing, fluid society in which young people are not allowed to internalize a coherent picture of who they are. There are too many options, too many choices, and there's a sense of, 'I don't know who I am—am I angry, am I contrite, happy, sad?' It's the scattered confusion of modern society." *Id.*

implications, emerge in cases regarding the detention of persons with personality disorder diagnoses.[69] The United States Supreme Court has rendered opinions that address the distinction (or lack thereof) between personality disorder and mental illness. In *Foucha v. Louisiana*, the Court held that a state may not detain a person acquitted by reason of insanity who no longer suffers from a mental illness because of "dangerousness" alone.[70] The plaintiff was acquitted on charges of aggravated burglary and illegal discharge of a firearm by reason of insanity and committed to a forensic psychiatric institution for an indefinite period.[71] In an examination four years later, two "medical doctors"[72] found that the plaintiff had recovered from the "drug induced psychosis" that served as the basis for his successful insanity defense, but had an "antisocial personality, *a condition that is not a mental disease* and that is untreatable."[73] The state conceded, perhaps based upon the physicians' characterization of antisocial personality disorder,[74] that Foucha was not mentally ill despite the presence of a

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[69] For example, in a recent case from the U.S. District Court in Oregon, *Howard v. Rea*, a state prison inmate serving a sentence for rape, challenged the Oregon Board of Prison and Post-Prison Supervision's ("Board") decision deferring his parole based on a finding that he was a "danger to the community" due to a "severe emotional disturbance." No. CV 02-6255-BR, 2005 U.S. Dist. LEXIS 43798 (D. Or. June 27, 2005). The Board's decision depended on the results of a psychological evaluation that provided a diagnosis of a "mixed personality disorder with narcissistic, aggressive, and paranoid tendencies" and noted that no medical treatment was available because the disorder was learned behavior rather than a mental illness. *Id.* at *1. The plaintiff alleged that the defendants violated the public services requirements of the ADA by deferring his parole on the basis of a disability and failing to provide access to mental health treatment for his alleged "emotional disturbance." *Id.* at *3. The court held that the Board based its decision on the plaintiff's "antisocial behavior," not a "mental illness," and that the plaintiff failed to identify any specific services that were denied to him. *Id.* at *4. Thus, even though the plaintiff received a DSM-based diagnosis, the court did not regard him as mentally ill because the diagnosis simply described his behavior and did not provide a basis to shift responsibility for his conduct away from him. *Id.*

[70] Foucha v. Louisiana, 504 U.S. 71 (1992). *See generally* Winick, *supra* note 47 (analyzing the narrow concept of mental illness underlying *Foucha* and arguing that it limits involuntary psychiatric hospitalizations to instances in which it is "therapeutically appropriate").

[71] *Id.* at 73–74.

[72] The decision does not indicate whether the doctors were psychiatrists. *Id.* at 74–75.

[73] *Id.* at 74–75 (emphasis added).

[74] Although the term Antisocial Personality Disorder was not specifically used in the opinion, the discussion suggests that the physicians intended the diagnosis to fit this DSM category. For example, the Court characterized the state's position as asserting that Foucha's "antisocial personality was a 'disorder for which there is no effective treatment.'" *Id.* at 81. Also, Justice White, writing for the majority, noted that many criminals who have completed their sentences "likely suffer from the same sort of personality disorder that Foucha exhibits." *Id.* at 85.

personality disorder.[75] Accordingly, *Foucha* did not require the Court to determine whether an antisocial personality disorder, or any personality disorder, is a mental illness.[76]

Five years later, in *Kansas v. Hendricks*,[77] the nature of "personality disorder" arose again as a category distinct from, but lumped in with, "mental abnormality" as a basis to detain a convicted sex offender under the Kansas Sexually Violent Predator Act.[78] The Kansas law established a basis for the state's involuntary civil commitment of individuals "convicted of or charged with a sexually violent offense" and who suffer from a personality disorder that increases their likelihood of committing another sexually violent act.[79] The Kansas legislature further reasoned that the "anti-social" personality elements that prompt sexually violent behavior are not amenable to existing mental illness treatment options.[80]

The *Hendricks* plaintiff challenging the statute had been diagnosed with "personality trait disturbance, passive-aggressive personality, and pedophilia."[81] He argued that the Supreme Court's prior decisions, including *Foucha*, outlining the due process requirements of civil commitment or detention established that one could be deprived of liberty only after diagnosis of a mental *illness*, as opposed to a mere mental *abnormality*.[82] The latter term, he argued, was a creation of the Kansas legislature not "the psychiatric community."[83] In rejecting this argument and upholding the Kansas statute, the Court noted:

> Contrary to Hendricks' assertion, the term "mental illness" is devoid of any talismanic significance. Not only do "psychiatrists disagree

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[75] *See, e.g., id.* at 86 ("[T]he State now claims that it may continue to confine Foucha, *who is not now considered to be mentally ill*, solely because he is deemed dangerous.") (emphasis added).

[76] *But see* Bruce Winick, *Ambiguities In The Legal Meaning And Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534, 547–48 (1995) (arguing that the determination of whether a personality disorder was a mental illness was a legal issue to be resolved in the *Foucha* opinion and that it is possible, although "problematic," to read the majority opinion as holding that personality disorders are not mental illnesses for purposes of justifying involuntary confinement).

[77] 521 U.S. 346 (1997).

[78] KAN. STAT. ANN. §§ 59-29a01–29a21 (1994).

[79] KAN. STAT. ANN. § 59-29a02(a).

[80] *Hendricks*, 521 U.S. at 351.

[81] *Id.* at 354 n.2.

[82] *Id.* at 358–59 (emphasis added).

[83] *Id.* at 358–59.

> widely and frequently on what constitutes mental illness," . . . but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement.
>
> Indeed, we have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. . . . As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of "insanity" and "competency," for example, vary substantially from their psychiatric counterparts. . . . Legal definitions, however, which must "take into account such issues as individual responsibility . . . and competency," need not mirror those advanced by the medical profession.[84]

Employing somewhat circular reasoning, the Court also rejected the plaintiff's argument that the detention was unconstitutional because it was potentially long-term and indefinite. The Court noted that the statute's aim is not to detain a person on a long-term or indefinite basis, but only "until his mental abnormality no longer causes him to be a threat to others."[85] However, as the Kansas Supreme Court noted in striking down the law, the plaintiff did not have a mental illness that could be treated or "changed," thereby eliminating any prospect for his eventual release.[86] In reversing, the Court sidestepped the problem of the plaintiff's potentially indefinite detention, and instead held that "incapacitation" (a term left undefined) can be a

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[84] *Id.* at 359 (internal citations omitted). The Court commented that the controversy within psychiatry on many of these issues is a reason to grant *greater* deference to legislative resolutions:

> In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. As we have explained regarding congressional enactments, when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'

Id. at 360 n.3 (internal citations omitted).

[85] *Hendricks*, 521 U.S. at 364.

[86] *In re* Care & Treatment of Hendricks, 912 P.2d 129, 136 (Kan. 1996).

valid basis for denying liberty, even in the absence of any prospect for treatment.[87]

As these cases indicate, the classification of personality disorder as a mental illness has had specific implications in the involuntary detention context. As we shall see in Parts III and IV, *infra*, the passage of the ADA created another context in which an individual's mental illness label possesses legal significance: the workplace. As a result, social liberals who may have resisted the expansion of notions of mental disorder due to a desire to avoid restraints on liberty now see the potential for expansion of civil rights in employment for those who are so labeled. Conversely, social conservatives, who may otherwise favor the "labeling" and control of those persons identified as ill object to the diagnosis if it yields "protection" from societal discrimination.

II. THE ADA AND THE IRKSOME EMPLOYEE

Psychiatry's pathologizing and medicalizing of certain behavior, conduct, and personalities, as described above, creates a tension in the plain language application of the ADA that prohibits discrimination based upon an individual's serious medical condition. Some fear that, if medicine applies a diagnosis to an individual, the "afflicted" individual may seek and obtain the protections and accommodations afforded to people with disabilities under the ADA. However, the cases below demonstrate that this does not generally occur when plaintiffs with actual or perceived personality disorders invoke the law to redress adverse employment actions. To avoid shifting responsibility for undesirable conduct away from individuals, the result-oriented opinions under the ADA uniformly minimize the pathology and emphasize the personality.

A. An Overview of the Employment Discrimination Provisions of the ADA

Congress enacted the ADA in 1990.[88] However, it was not the first federal law to extend civil rights protection to people with disabil-

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[87] *Hendricks*, 521 U.S. at 365–66. However, the Court appeared to take comfort from Kansas's assertions that, at the time of argument, individuals committed under the Act received an average of 31.5 hours of "treatment" each week. *Id.* at 368.

[88] Americans with Disabilities Act of 1990, 101 Pub. L. No. 336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C.).

ities in the workplace. In 1974, Congress amended the Rehabilitation Act to prohibit discrimination against "otherwise qualified" people with disabilities by federal agencies and programs receiving federal financial assistance.[89] By enacting Title I[90] of the ADA, Congress intended to extend the protections enjoyed by employees in federally funded programs and federal agencies to the private sector.[91]

Title I the ADA provides: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment."[92] This broad prohibition contains several dimensions that reflect the varied ways that persons with disabilities may encounter discrimination on the job. For example, a claim may be brought not only for a failure to hire or for termination, but also for employing criteria that tend to screen out people with disabilities,[93] for failing to provide a reasonable accommodation,[94] for requiring applicants or employees to undergo medical examinations,[95] or for retaliation.[96]

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[89] 29 U.S.C. § 794 provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a) (2000). Other provisions of the Rehabilitation Act require affirmative action plans and programs for people with disabilities within every federal agency and most federal contractors. 29 U.S.C. §§ 791, 793 (2000).

[90] Congress enacted five "Titles" of the ADA, 101 Pub. L. No. 336 (1990): 1) Title I applies to employment in both the public and private sector (101 Pub. L. No. 336, §§ 101–108, (enacting 42 U.S.C. §§ 12112–12117)); 2) Title II prohibits discrimination by public entities in the provision of programs and services (101 Pub. L. No. 336, §§ 201–246 (enacting 42 U.S.C. §§ 12112–12117)); 3) Title III prohibits discrimination by "public accommodations" in the provision of goods and services and in furnishing transportation (101 Pub. L. 336, §§ 301–310 (enacting 42 U.S.C. § 12132)); 4) Title IV requires telephone companies to provide relay services for individuals who use TTY and similar equipment and requires television stations to close-caption federally-funded public service announcements (101 Pub. L. No. 336, §§ 401–402 (amending 27 U.S.C. § 225)); and 5) Title V contains several "miscellaneous" provisions (101 Pub. L. No. 336, §§ 501–514).

[91] Prior to 1990, some states had already accomplished this through state non-discrimination statutes.

[92] 42 U.S.C. § 12112(a) (2000).

[93] 42 U.S.C. § 12112(b)(6) (2000).

[94] 42 U.S.C. § 12112(b)(5)(A) (2000).

[95] 42 U.S.C. § 12112(d) (2000).

[96] *See, e.g.*, Pugh v. City of Attica, 259 F.3d 619, 630 (7th Cir. 2001).

The starting point for any claim is whether the plaintiff can claim protection as a "qualified individual with a disability" under the statute.[97] Only after this requirement is satisfied will a court consider whether the employee suffered an adverse employment action because of the disability.[98]

The statute's conception of "disabled" individuals consists of three broad categories: 1) those who have a physical or mental impairment substantially limiting one or more major life activities;[99] 2) persons with records of such an impairment;[100] or 3) persons who are "regarded as" having such an impairment.[101] A mental impairment is defined as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[102]

A plaintiff is a "qualified" individual with a disability if she can perform the essential functions of the job in question, with or without reasonable accommodation.[103] An "essential function" is one that has a more than marginal relationship to the job.[104] If the plaintiff is not able to perform the job's functions, a court must consider whether some reasonable accommodation could enable her to do so.[105]

Significantly, the ADA's drafters did not define "disability" based upon a medical or diagnostic approach,[106] but on a functional

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97 42 U.S.C. § 12111(8) (2000).

98 Unlike the Rehabilitation Act of 1973, the ADA regime has enabled the vast majority of federal appeals courts to hold that a plaintiff need not prove that her disability was the *sole* motivating factor behind the adverse employment action, but that it was a motivating factor. McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1073–77 (11th Cir. 1996); *see also* Head v. Glacier Nw., Inc., 413 F.3d 1053, 1063–66, 1064 n.55 (9th Cir. 2005) (following *McNely* and additional cases that hold that plaintiffs need not establish disability-based discrimination as the sole basis of adverse employment action). *But see* Hedrick v. W. Reserve Care Sys. & Forum Health, 355 F.3d 444, 454 (6th Cir.), *cert. denied*, 543 U.S. 817 (2004) (holding that, in order to prevail on ADA claim, a plaintiff must demonstrate that disability was the sole basis for the adverse employment action).

99 42 U.S.C. § 12102(2)(A) (2000).

100 42 U.S.C. § 12102(2)(B) (2000).

101 42 U.S.C. § 12102(2)(C). Title I also prohibits discrimination based upon association with a person with a disability. 42 U.S.C. § 12112(b)(4) (2000).

102 29 C.F.R. § 1630.2(h)(2) (2000).

103 42 U.S.C. § 12111(8) (2000).

104 29 C.F.R. § 1630.2(n) (2000).

105 In this sense, the notion of reasonable accommodation is built into the definition of disability.

106 However, the U.S. Equal Employment Opportunity Commission's *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, states that the current edition of the DSM (DSM-IV), "is relevant for identifying [mental or psychological] disorders.

approach (i.e., substantial limitation in one or more major life activities), which was used in the regulations promulgated under the Rehabilitation Act's definition of "disability."[107] Specifically, the functional approach

> views many limitations resulting from actual or perceived disabilities as flowing, not from limitations of the individual, but, rather, from the existence of unnecessary barriers to full participation in society and its institutions, . . . in contrast to the medical model of disability that centers on assessments of the degree of a person's functional limitation.[108]

This framework is sometimes referred to as the "Social Model of Discrimination."[109]

The majority of ADA employment discrimination claims filed with courts result in favorable outcomes for employers because in most cases the plaintiff fails to establish that she is a "person with a disability" in pre-trial motions challenging the sufficiency of her claims.[110] A series of decisions of the United States Supreme Court

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The DSM-IV has been recognized as an important reference by the courts and is widely used by American mental health professionals for diagnostic and insurance reimbursement purposes." 8 FEP Manual (BNA) 405:7461, 405:7462 (2003) ("*Enforcement Guidance*"), *available at* http://www.eeoc.gov/policy/docs/psych.html (last visited Nov. 25, 2006). It also notes that not all conditions listed in the DSM-IV "are disabilities, or even impairments." *Enforcement Guidance* at 405:7462, 405:7462-63 nn.7–12. *Cf.* Boldinia v. Postmaster Gen., 928 F. Supp. 125, 130 (D.N.H. 1995) (noting in a Rehabilitation Act case that a court "may give weight to the diagnosis of mental impairment which is described in" the DSM).

107 This definition sharply contrasts with the Social Security Act, which determines disability and qualification for benefits by first using a set of "listings" with specific conditions and then a functional determination of vocational limitation. 42 U.S.C. § 423(d)(2)(C) (2000); 42 U.S.C. § 1382c(a)(3) (2000); 20 C.F.R. 404.1520(a)(4)(iii) (2006). Earlier versions of the ADA included a list of covered conditions, but this approach was ultimately rejected in favor of the Rehabilitation Act approach. Chai Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?* 21 BERKELEY J. EMP. & LAB. L. 91, 127–34 (2000).

108 NATIONAL COUNCIL ON DISABILITY, RIGHTING THE ADA 109 (2004), *available at* http://www.ncd.gov/newsroom/publications/2004/pdf/righting_ada.pdf (last visited Sept. 21, 2006). *See generally* SIMI LINTON, CLAIMING DISABILITY (New York Univ. Press 1998); LENNARD DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY (Verso 1995).

109 NATIONAL COUNCIL ON DISABILITY, *supra* note 108, at 109.

110 Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 110–33 (1999); James G. Frierson, *Heads You Lose, Tails You Lose: A Disturbing Judicial Trend in Defining Disability*, 1997 LAB. L.J. 419, 419–24, 426–28 (1997); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 123–31 (1997). *See generally*, NATIONAL COUNCIL ON DISABILITY, *supra* note 108, at 44–74; Kathryn Moss, et al., *Preva-*

severely restricted the definition of disability in several important respects, with far-reaching impact.[111] These decisions markedly contrast with the case law under the Rehabilitation Act, in which the question of whether an individual was in fact handicapped was rarely litigated.[112] Due to the courts' construction of the ADA's functional approach to defining disability, thereby requiring a case-by-case scrutiny of every plaintiff's claimed disability, numerous cases have been dismissed at the summary judgment stage. Notably, courts have declined to find some plaintiffs with serious conditions (such as cancer[113] and multiple sclerosis[114]) to be "disabled" under this functional or social model of disability.[115]

While many disability rights commentators note Title I's limited reach with disappointment,[116] that disappointment is more pronounced among advocates for persons with mental illness. Many commentators[117] agree that persons with psychiatric illness have fared far

lence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts, 29 MENTAL PHYSICAL DISABILITY L. REP. 303 (May/June 2005); Amy Albright, *2004 Employment Decisions Under the ADA Title I – Survey Update*, 29 MENT. PHYS. DIS. L. REP. 513, 513 (July/Aug. 2005) (reporting that, "[i]n all but a handful of cases, employers won on motions for summary judgment or to dismiss, due to plaintiff employee's failure to meet the prima facie case of discrimination").

111 Toyota Mfg. Co. v. Williams, 534 U.S. 184, 200–01 (2002) (holding that plaintiff claiming to be limited in the major life activity of "work," must demonstrate that she is unable to perform a variety of tasks central to most people's lives, not just the tasks required by her previous job); Sutton v. United Airlines, 527 U.S. 471, 482–83 (1999) (holding that available "mitigating measures" must be considered when determining the extent and impact of a person's disability); Murphy v. United Parcel Serv., 527 U.S. 516, 521 (1999) (holding that "the determination of petitioner's disability is made with reference to the mitigating measures he employs"). *See generally* Feldblum, *supra* note 107, at 139–60.

112 Feldblum, *supra* note 107, at 107.

113 Ellison v. Software Spectrum, Inc., 85 F.3d 187, 193 (5th Cir. 1996) (holding that a plaintiff with breast cancer was not disabled).

114 *See* Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 885 (6th Cir. 1996) (holding the plaintiff, who suffered from multiple sclerosis, failed to establish that she was regarded as disabled).

115 *See Sutton*, 527 U.S. at 486–87 (noting that as a result of Congress's decision to adopt a "functional" approach to defining disability, as opposed to one based upon diagnosis *per se*, the number of people covered under the ADA is significantly smaller than it would be under a "nonfunctional" approach).

116 *See, e.g.*, RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT (New York Univ. Press 2005); BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., Univ. of Mich. Press 2003); *see also* Albright, *supra* note 110, at 516 (reporting that forty-one of the fifty-four decisions (76%) in 2004 in ADA "mental illness" claims were "wins" for the employer).

117 *See* SUSAN STEFAN, HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES (Am. Psychol. Ass'n 2002) (surveying the particular chal-

worse than persons with physical disabilities, and have not benefited from the gains of the disability rights movement.[118] Indeed, recent empirical studies of claim outcomes may lend some support to this perception, although individual studies have reached somewhat different findings.[119] The legal and social challenges are then even more

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lenges facing people with mental illness in the workplace and the legal remedies available to address claims of discrimination); Emens, *supra* note 48; Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585 (2003) (examining how people with mental illness have fared in claims brought under the ADA); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and The Americans With Disabilities Act*, 52 ALA. L. REV. 271, 273 (2000) (concluding that "people with psychiatric disabilities have received minimal benefit from the ADA's protections against employment discrimination"); Randel I. Goldstein, Note, *Mental Illness in the Workplace After* Sutton v. United Air Lines, 86 CORNELL L. REV. 927 (2001) (arguing that the ADA's three-prong definition of disability presents unique problems for people with mental illness, particularly in light of recent Supreme Court case law regarding the definition of disability under the statute); Stephanie Proctor Miller, Comment, *Keeping The Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701 (1997) (finding that courts inappropriately rely upon Rehabilitation Act precedent when applying the ADA in claims brought by people with mental illness); Michelle Parikh, *Note: Burning The Candle At Both Ends, And There Is Nothing Left For Proof: The Americans With Disabilities Act's Disservice To Persons With Mental Illness*, 89 CORNELL L. REV 721, 725 (2004) (describing ways in which the ADA "disserves" plaintiffs with mental illness seeking protection under the statute).

[118] NAT'L COUNCIL ON DISABILITY, FROM PRIVILEGES TO RIGHTS: PEOPLE LABELED WITH PSYCHIATRIC DISABILITIES SPEAK FOR THEMSELVES, 2000, *available at* http://www.ncd.gov/newsroom/publications/2000/pdf/privileges.pdf (last visited Nov. 25, 2006). Basing their findings on information gathered from public hearings and additional investigation, the authors noted that the primary proponents of the ADA are part of a larger group who have left persons with mental illness in this second-tier status:

> The disability rights and independent living movements have in most cases failed to defend with equal passion the rights and humanity of people with psychiatric disabilities. While discrimination and abuse toward people with physical disabilities stirs indignation, at the same time we barely notice that people with psychiatric disabilities endure both on a daily basis. Unfortunately, like most Americans, the disability rights and independent living movements are still too quick to accept powerful demonizing stereotypes that people with psychiatric disabilities are crazy, dangerous, stupid, and evil. Recognizing and eliminating these prejudices will empower people with psychiatric disabilities to achieve the same self-determination now available to many of their peers with physical disabilities, and to build a strong, unified cross-disability movement.

Id. at 18.

[119] *See* Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?* 66 MD. L. REV. 94 (2006) (concluding, based upon the authors' study of 537 ADA employment claims, that people with psychiatric disability fared significantly worse in employment discrimination lawsuits than plaintiffs with nonpsychiatric disabilities). *But see* Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 65–66 (2006) (finding some slight disparities between the outcomes of plaintiffs with psychiatric disabilities and those without, most notably in the formers' more limited success in demonstrating that they are qualified for the jobs in question).

pronounced for those with personality disorders, who are significantly impaired in their social functioning. As discussed above, the DSM-IV-TR notes that the individual's relation to the expectations of his or her culture reveals the "essential feature" of personality disorders.[120] Thus, by definition, persons with personality disorders engage in conduct that fails to meet the "expectations" of modern American society. The question presented by the ADA is to what extent, if at all, society must accommodate that failure. However, courts' application of the "disability" definition to these cases has deferred response to that question.

B. The Role of Personality in ADA Disparate Treatment Cases

Notions of "personality" have limited the relief sought by persons alleging actual or perceived mental illness. This limitation can be traced by reviewing the debate over whether to include mental illness—and specifically personality disorders—in the ADA's scope and exploring how some of the concerns regarding disagreeable employees raised immediately before and after the ADA's enactment emerge in the case law. In particular, courts' attempts to distinguish between personality and mental illness restrict the class of employees who can seek the ADA's protection by excluding social functioning as a "major life activity" and including such functioning as a potential "essential function" of a job. The result is a safe harbor for any employer taking an adverse employment action based upon an employee's allegedly objectionable personality.

1. The Pre- and Post-Enactment Debate on Including Personality Disorders in the ADA's Scope

An examination of the application of the ADA to persons with personality disorders begins with the congressional debate that preceded passage. While few in Congress questioned the general concept of extending civil rights in employment to persons traditionally regarded as being disabled—primarily those with sensory or mobility impairments—there was considerable controversy over including persons with mental illness within the statute's scope.[121] Indeed, while Congress ultimately adopted a functional approach to defining disability generally, Congress *excluded* individuals with certain specific

120 *See supra* notes 23–36 and accompanying text.

121 *See* Feldblum, *supra* note 107, at 129–33.

mental disorder diagnoses from coverage under the ADA.[122] During congressional debate, a small group of senators attempted to eliminate *all* individuals with DSM diagnoses from the statute's protections.[123]

Seven years after the ADA's passage, the Equal Employment Opportunity Commission ("EEOC") released its Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities ("Enforcement Guidance").[124] The Enforcement Guidance specifically includes "personality disorders" in its list of "emotional or mental illness[es]" covered under the ADA's definition of "mental impairment" and fleshed out in the agency's regulations.[125] However, the agency specifically notes, "traits or behaviors are not, in themselves, mental impairments . . . although they may be linked to mental impairments."[126] This distinction between "impairments" and "traits" also appears in the agency's commentary on the EEOC's interpretive regulations.[127]

Opposition to including persons with mental illness in the employment context only increased after the ADA's enactment and the issuance of the EEOC's Enforcement Guidance. The United

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122 42 U.S.C. § 12211(b) (2000) (Under the ADA, "disability" is defined to not include: "1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; 2) compulsive gambling, kleptomania, or pyromania; or 3) psychoactive substance use disorders resulting from current illegal use of drugs.").

123 Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 451 (1991) ("At one point, Senator [William] Armstrong stood on the Senate floor and pointed to a long list of conditions in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association as an example of all the conditions included. His remarks raised the specter of a potential roll call on individual amendments to remove each of these conditions.") (citing 135 CONG. REC. S10765–86 (daily ed. Sept. 7, 1989) (statement of Sen. Armstrong)); *see also* Feldblum, *supra* note 107, at 131 n.212 (commenting that Senator Armstrong once proposed an amendment to exclude a large number of mental disorders from the ADA, but negotiations narrowed the list to the conditions now found in § 12211(b)). Senator Armstrong subsequently issued a statement a week after the passage of the ADA on the issue of "ADA, Mental Impairments, and the Private Sector," in which he warned of the "potentially disruptive" effects of the inclusion of mental impairments, such as borderline personality disorder and schizoid personality disorder, in the ADA. *Id.* (citing 135 CONG. REC. 19,853, 19,884–85).

124 *Enforcement Guidance*, *supra* note 106.

125 *Id.* at n.6 (citing 29 C.F.R. § 1630.2(h)(2)).

126 *Id.* at n.13.

127 *Interpretive Guidance on Title I of the ADA*, 29 C.F.R. app. § 1630 ("[T]he definition [of disability under the ADA] does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder.").

States Commission on Civil Rights ("USCCR") released a report after two days of public hearings in November 1998 on the EEOC's enforcement of the law.[128] The USCCR reported on the "national media frenzy" that accompanied the release of the EEOC's Enforcement Guidance, including "editorials painting nightmare scenarios of manipulative substandard employees with headings such as 'Employers are Terrified.'"[129] Some of those persons testifying before the Commission urged the elimination of psychiatric disorders from the ADA's coverage.[130]

The extension of civil rights to persons with personality disorders, which the EEOC confirmed by referencing personality disorders in the Enforcement Guidance, sparked specific controversy and comment. One commentator warned that the inclusion of personality disorders

> provides a plethora of new opportunities for problem employees to disguise their misconduct as disease. Although a nasty or insubordinate employee might not qualify as disabled if his bad attitude is considered in isolation, if his attitude can be linked somehow to a personality disorder, he will be considered to have an "impairment" that may qualify for ADA coverage.[131]

A management-side attorney testified that the definition of disability for mental impairments should be limited to "Axis I Clinical Disorders," which would exclude all categories of personality disorders.[132] Thus, defense attorneys were primed from the outset to challenge the extension of the ADA to problem employees. As the following

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128 U.S. Comm'n on Civil Rights, *Sharing the Dream: Is the ADA Accommodating All?*, ch. 5 (2000) [hereinafter USCCR], *available at* http://www.usccr.gov/pubs/pubsndx.htm (follow "Disability" hyperlink; then follow "Sharing the Dream: Is the ADA Accommodating All?" hyperlink) (last visited Sept. 21, 2006).

129 *Id. See also* Mollie Weighner Marti & Peter David Blanck, *Attitudes, Behavior, and ADA Title I in* EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 359–61 (Peter David Blanck ed. 2000) (noting that empirical studies of employers' and co-workers' attitudes towards persons with disabilities in the workplace revealed "extreme negative attitudes" towards persons with mental illness and addiction).

130 USCCR, *supra* note 128, at n.121 (quoting Roger Clegg).

131 *Id.* at n.33 (quoting James J. McDonald, Jr.). *See also* James J. McDonald, Jr. & Jonathan P. Rosman, *EEOC Guidance on Psychiatric Disabilities: Many Problems, Few Workable Solutions*, 23 EMP. RELATIONS L.J. 5, 8 (1997).

132 USCCR, *supra* note 128, at nn.31–32 (quoting Jonathan Mook).

review of cases demonstrates, they achieved far more success in the courts than in Congress in excluding such employees from the ADA's scope.

2. *The Courts' Attempts to Distinguish Personality from Mental Illness*

Despite early concerns about the inclusion of personality disorders as disabilities for purposes of the ADA, employers have had nothing to fear in this regard. Courts approached this issue by relying on an assumption that there is a true and identifiable distinction between "mental disorders," which are covered under the ADA, and "personality traits," which are not. This means that "personality," unlike disability, can figure into employment decisions without running afoul of the law. This approach makes sense on a theoretical level because society functions through personality "discrimination." In the workplace, employees are evaluated at the hiring, retention, and promotion stages based upon their performance in the area of "interpersonal skills": communication, cooperation, teamwork, customer service, pleasantness, and so forth. Indeed, we choose our friends and life partners based in large part on their personalities. Accordingly, few would argue that legislation should compel an employer to suffer an "utter jerk" in the workplace.

However, as Part I discussed, the distinction between "personality traits" and "mental illness" is not the clear result of empirical science or medicine, but is socially constructed. Therefore, the distinction is particularly susceptible to controversy, arbitrary use, and misuse. As Susan Stefan notes:

> [M]any of the most crucial and salient symptoms or characteristics of mental disability can be considered 'common personality traits.' These include the inability to tolerate stress, difficulties with interpersonal and social relationships, and periodic difficulties in focusing and concentration. As the literature confirms, mental disability is not something separate and apart from personality, it simply represents extremes along a variety of cognitive and affective continua.[133]

Nonetheless, in implementing the ADA, courts seek and sometimes purport to find a clear line between "mental illness," which implicates

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[133] STEFAN, HOLLOW PROMISES, *supra* note 117, at 63.

the ADA's provisions, and mere "personality traits," which employers may handle as they see fit. As one district court declared in a recent decision: "Emotional volatility or imbalance is not a disability. . . . As a matter of law, 'personality conflicts among coworkers (even those expressed through the use [or misuse] of mental health terminology) generally do not establish a perceived impairment on the part of the employer.'"[134] In other words, courts have adopted an "I know it when I see it"[135] case-by-case approach to drawing that line.

For example, in *Stewart v. County of Brown*, the Court of Appeals for the Seventh Circuit affirmed the trial court's summary judgment order in favor of the employer who required the plaintiff-employee to undergo a number of psychological evaluations and then transferred him to another position, even though the evaluations indicated that he was "fit for duty."[136] The plaintiff alleged that his employer regarded him as disabled, pointing to the employer's referral for the psychological evaluations and the employer's statements to third persons that plaintiff was "temperamentally unfit to serve as a sheriff's deputy" and was "emotionally or psychologically imbalanced."[137] The appeals panel rejected these arguments and concluded that the case "boil[ed] down to nothing more than personalities."[138]

Pouncy v. Vulcan Materials Co.,[139] decided within the first years of the ADA,[140] reveals a federal district court's struggle to locate and grasp the illness/personality distinction. Although the plaintiff was never diagnosed with any mental impairment, the record on summary

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134 Mickens v. Polk County Sch. Bd., 430 F. Supp. 2d 1265, 1274 (M.D. Fla. 2006) (quoting Lanman v. Johnson County, 393 F.3d 1151, 1157 (10th Cir. 2004)).

135 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (referring to the line between "hard-core" pornography and material that is within the scope of the First Amendment's protections).

136 Stewart v. County of Brown, 86 F.3d 107 (7th Cir. 1996).

137 *Id.* at 111. The recent decision in Mickens v. Polk County Sch. Bd., 430 F. Supp. 2d 1265 (M.D. Fla. 2006), is based upon a similar fact pattern, with a similar outcome. The district court granted the defendant-employer's post-trial motion as a matter of law on claims brought by a terminated assistant principal who alleged that the defendant regarded him to be mentally ill. *Id.* at 1283. The school had required the plaintiff to undergo a psychological evaluation based upon concerns about his apparent "emotional volatility." *Id.* at 1274–75.

138 *Id.*

139 920 F. Supp. 1566 (N.D. Ala. 1996).

140 Title I became effective for employers with twenty-five or more employees on July 26, 1992 and for employers with fifteen or more employees beginning on July 26, 1994. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, § 108; 42 U.S.C. § 12111(5)(A) (linking definition of "employer" to employer size and effective date).

judgment indicated that she experienced a significant number of problems in the workplace, most notably a "negative attitude," "insubordination," and an "argumentative and uncooperative" attitude.[141] The employer sent the plaintiff to a career counselor who recommended (to the employer) that the plaintiff undergo long-term individual counseling.[142] After she was terminated by her employer, the plaintiff challenged the termination in an ADA claim. Plaintiff did not allege that she had a disability, but rather that her employer "perceived her as being mentally disabled,"[143] thereby invoking the "regarded as"[144] prong of the definition of disability.

The trial court admitted that it was "particularly troubled" by the "'perceived disability' analysis" as applied to the facts before it. It explained:

> The evidence is equally protective of Pouncy's position that the defendants viewed Pouncy as having a mental illness that was interfering with her ability to perform her job as it is of the Vulcan's position that Pouncy merely had poor behavioral traits and performance problems.[145]

For purposes of summary judgment, the court felt compelled to assume that the plaintiff had established that the defendant perceived her as having a mental impairment.[146] In a lengthy footnote, however, the court explained its discomfort with the analysis it believed the statute and regulations warranted.[147] While the regulations state that the "regarded as" provision was intended to combat "'unfounded myth[s], fear[s], and stereotype[s],'"[148] the regulations also provide that "individuals with common personality traits such as poor judgment or a quick temper are not considered disabled."[149] The district court also noted that in the absence of any diagnosis of mental impairment, the

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141 *Pouncy*, 920 F. Supp. at 1573–74.

142 *Id.* at 1576.

143 *Id.* at 1577–78.

144 42 U.S.C. § 12102(2)(C) (2000).

145 *Pouncy*, 920 F. Supp. at 1580.

146 *Id.*

147 *Id.* at 1580 n.8.

148 *Id.* (quoting 29 C.F.R. app. § 1630.2(1)).

149 *Id.*

plaintiff's personality alone seemed to be the cause of her problems.[150] The court looked to other opinions that defined "disability" as excluding "commonplace conditions such as personality traits."[151]

The *Pouncy* court found the record before it to be "strikingly similar" to that before the Court of Appeals for the Second Circuit in a Rehabilitation Act case, *Daley v. Koch*.[152] In that case, pre-employment psychological profile tests revealed that the plaintiff-candidate had "poor judgment, irresponsible behavior and poor impulse control," and therefore was unsuitable for the position of police officer.[153] Such traits, the appeals court noted, do not rise to the level of impairment.[154] The *Pouncy* court expressed concern that the "purpose of the [ADA] will be compromised" if the traits presented in the record were given statutory protection.[155] However, the employer's encouragement that the plaintiff seek counseling saved the plaintiff's claims at the summary judgment stage because it lent support to her contention that the employer regarded her as mentally ill.[156] Ultimately, the court concluded that she did not establish that the defendant regarded her as substantially limited in a major life activity, that she was not "qualified," and that there was no evidence giving rise to an inference of discrimination.[157]

The personality-versus-illness question is related to and sometimes overlaps with how to accommodate workplace "misconduct" that is a manifestation of a mental illness. As a general matter, it is reasonable to permit employers to discharge or discipline employees who behave badly. However, mental illness primarily manifests itself through "conduct," and therefore adverse employment actions may have a disparate impact on people with mental illness.[158] Since the ADA protects the disability, not the misconduct, cases involving dis-

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150 *Pouncy*, 920 F. Supp. at 1580 n.8. Thus, the court may have taken comfort in a personality disorder *diagnosis* of the plaintiff by a mental health professional, even if such diagnosis was nothing more than another way of stating that her personality was the source of her work problems.

151 *Id.* (citing Daley v. Koch, 892 F.2d 212 (2d Cir. 1989); Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986); Clark v. Virginia Bd. of Bar Exam'rs, 861 F. Supp. 512 (E.D. Va. 1994)).

152 892 F.2d 212 (2d Cir. 1989).

153 *Id.* at 214.

154 *Id.* at 215.

155 *Pouncy*, 920 F. Supp. at 1580 n.8.

156 *Id.*

157 *Id.*

158 Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 188–89 (2005).

charge following misconduct generally result in favorable outcomes for the employer.[159]

3. *Courts' Approaches to Claims Brought by Persons with Personality Disorder Diagnoses*

Those cases in which the plaintiff has been diagnosed with a personality disorder reveal that, when making a pretrial determination as to whether an employee's conduct implicates a protected disability or merely some kind of disfavored personality trait, courts will invariably rule in the employer's favor.[160] It should be noted that there is no clear category of "personality disorder cases." Overall, as compared with the prevalence of personality disorders reported in the DSM-IV-TR, there are few ADA cases in which the plaintiff asserts a personality disorder.[161] Indeed, it is rare that a personality disorder diagnosis constitutes the sole or even primary diagnosis in a case; rather, it is usually one of several conditions asserted as the basis for actual or perceived disability. Further, many of the cases discussed in this section involve claims seeking relief under several legal theories, only one of which is disability discrimination.[162]

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159 *Id.* at 294 (arguing that "courts should scrutinize the record for evidence of pretext, keeping in mind that employers may view misconduct committed by employees with mental disabilities more severely because of the stigma and stereotypes associated with such disabilities"). *Cf.* Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995) (differentiating between conduct that one can control and that which is beyond control, drunk-driving versus seizure, which represents specific judgments and assumptions about the nature of mental illness). Taking a more thoughtful approach to this issue, the Tenth Circuit noted that mental illness manifests itself by abnormal behavior and reasoned that "[t]o permit employers carte blanche to terminate employees with mental disabilities on the basis of any abnormal behavior would largely nullify the ADA's protection of the mentally disabled." Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1087 (10th Cir. 1997). The Tenth Circuit requires the employer to demonstrate that the conduct standard the plaintiff allegedly violated must be "job-related and consistent with business necessity" before it may serve as a defense to discharge based upon disability-related misconduct. *Id.* at 1086 n.8; *see also* Nielsen v. Moroni Feed Co., 162 F.3d 604, 608 (10th Cir. 1998). Comprehensive analyses of this specific problem have been undertaken by others and the issue is outside the scope of this Article. *See generally* Timmons, *supra* note 158; *see also*, Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931 (1997).

160 *See also* STEFAN, HOLLOW PROMISES, *supra* note 117, at 61–65.

161 *See supra* note 58 and accompanying text.

162 *See, e.g.*, Pilman v. N.Y. City Hous. Auth., 214 F. Supp. 2d 325 (S.D.N.Y. 2003) (raising claims on the basis of race, retaliation, and disability discrimination); Haskins v. New Venture Gear, No. 3:01-CV-0135-P, 2002 U.S. Dist. LEXIS 4552 (D. Ind. Jan. 16, 2002) (raising claims on the basis of race, age, gender, retaliation, and disability).

In 2000, Susan Stefan, an attorney with the Center for Public Representation reviewed more than 800 disability-discrimination cases filed by persons claiming psychiatric disabilities and reported that only sixty-seven were filed by individuals who disclosed a personality disorder.[163] This author's review of the case law suggests that the percentage of cases filed by those alleging personality disorders may in fact be lower now than at the time of Stefan's analysis since the bulk of the reported decisions involving such claims appear to have been decided within the first decade of the ADA's effective date.[164] Indeed, the EEOC does not even maintain statistics specifically on claims filed with that agency by those with personality disorders.[165]

Why is there an apparent under-representation of plaintiffs claiming discrimination based upon a personality disorder in comparison with other psychiatric illnesses? Stefan suggests, "the levels of stigma and discrimination against people with these diagnoses are so high that people with these diagnoses either do not want to disclose the diagnosis, cannot obtain counsel, or have given up on any chance of having discriminatory activity against them punished or corrected."[166] She notes that the USCCR's 1998 report on disability discrimination included comments from those who wondered whether the EEOC "is requiring an employer to accommodate behaviors such as the paranoid employee's penchant for spreading false and destructive rumors, the borderline employee's manipulation of supervisors and coworkers, the histrionic employee's sexually provocative dress and innuendo, or the narcissistic manager's insensitivity and denigration of subordi-

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163 Stefan, *Delusions of Rights*, *supra* note 20, at 279 n.46. Presumably, her count includes plaintiffs who claim to have additional psychiatric impairments.

164 Data and conclusions of review on file with author.

165 The EEOC tracks claims based on the asserted disability's nature and allocates claims based on mental illness to the following categories: Alcoholism, Anxiety Disorder, Autism, Depression, Drug Addiction, Learning Disabilities, Manic Depressive Disorder, Mental Retardation, Schizophrenia, and Other Psychological Disorders. Presumably, cases involving a personality disorder as the primary diagnosis would fall under the "other" category. This group (which would certainly include disorders other than personality disorders), comprises approximately 3.2% of all claims filed with and resolved in some way by the EEOC from July 26, 1992 to September 30, 2004. http://www.eeoc.gov/stats/ada-resolutions.html (last visited Sept. 21, 2006). By way of comparison, Depression was raised in 6.7% of claims, Anxiety in 2.6%, Manic Depressive Disorder in 1.8%; and Schizophrenia in 0.4%. *Id.* Note that these numbers do not include "regarded as" claims, which account for 11.1% of those filed to date. *Id.*

166 Stefan, *Delusions of Rights*, *supra* note 20, at 278.

nates."[167] Another reason could be that persons with personality disorders may not identify themselves as "disabled" as readily as those with Axis I diagnoses,[168] and therefore may be less likely to use the ADA as a vehicle to enforce their rights.

Of course, would-be plaintiffs may also face the practical challenge of finding attorneys to take their cases. Attorneys may feel sympathy for the employers and co-workers of the plaintiffs in these cases and therefore be unwilling to press such a claim. Attorneys might also be wary of representing someone who shows signs of being a "problem client" by having a personality disorder diagnosis. Further, since plaintiffs alleging personality disorders rarely proceed past the initial pleading or summary judgment stages of their lawsuits, it should not be surprising that, as these losses fill the books, attorneys are increasingly reluctant to take on cases involving personality disorder claims.[169]

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[167] *Id.* at 278–79 (quoting U.S. Comm'n on Civil Rights, *Helping Employers Comply with the ADA: An Assessment of How the United States Equal Employment Opportunity Commission is Enforcing Title I of the Americans with Disabilities Act* 122 (1998)).

[168] This supposition is based upon Szasz's observation that those with personality disorder diagnoses often dispute that they have a mental disorder at all. *See supra* notes 60–63 and accompanying text.

[169] Although no empirical survey has been conducted, a review of the case law suggests an overrepresentation of "personality disorder" cases brought by *pro se* plaintiffs. This fact implies that individuals who feel wronged have a difficult time finding attorneys, who generally represent ADA plaintiffs on a contingent-fee basis, willing to gamble on their disability discrimination claims. *See, e.g.*, Pilman v. N.Y. City Hous. Auth., 64 Fed. App'x 293 (2d Cir. 2003); Marshall v. Metal Container Corp., No. 98-1595, 1998 U.S. App. LEXIS 27863 (7th Cir. Oct. 27, 1998); Dale v. Moore, 121 F.3d 624 (11th Cir. 1997); Limwongse v. N.Y. State Office of Mental Health, No. 03-CV-5273, 2005 WL 2786966 (E.D.N.Y. Oct. 26, 2005); McRae v. Potter, No. 98-1595, 2002 U.S. Dist. LEXIS 6977 (D. Ill. Apr. 18, 2002); Brown v. Affiliated Computer Servs., No. 3:01-CV-0135-P, 2002 U.S. Dist. LEXIS 6392 (D. Tex. Apr. 12, 2002); Haskins v. New Venture Gear, No. 3:01-CV-0135-P, 2002 U.S. Dist. LEXIS 4552 (D. Ind. Jan. 16, 2002); Madonia v. Mavo Leasing, Inc., No. 98 C 601, 2000 U.S. Dist. LEXIS 5488 (D. Ill. Apr. 13, 2000); Tokar v. City of Chicago, No. 98 C 601, 1999 U.S. Dist. LEXIS 19863 (D. Ill. Dec. 21, 1999); DiBenedetto v. City of Reading, No. 96-CV-5055, 1998 U.S. Dist. LEXIS 11804 (D. Pa. July 16, 1998); Edwards v. WINCO Mfg. Co., 5 F. Supp. 2d 743 (D. Mo. 1998); Hardy v. Sears, Roebuck & Co., No. 4:95-CV-0215-HLM, 1996 U.S. Dist. LEXIS 19008 (D. Ga. Aug. 28, 1996); Ellison v. Northwest Airlines, 938 F. Supp. 1503 (D. Haw. 1996); McCready v. Michigan State Bar Standing Comm. on Character & Fitness, 926 F. Supp. 618 (D. Mich. 1995); Palmer v. Circuit Court, Social Serv. Dep't, 905 F. Supp. 499 (D. Ill. 1995); Kemer v. Johnson, 900 F. Supp. 677 (S.D.N.Y. 1995); Gent v. Gordon, No. 94-75-A, 1995 U.S. Dist. LEXIS 21874 (D. Va. Mar. 15, 1995). Not surprisingly, these *pro se* plaintiffs rarely prevail on defendants' pre-trial motions, resulting in dismissal of claims for failing to meet timeliness, jurisdictional or pleadings requirements, or on issue or claim preclusion grounds. Accordingly, there is little if any discussion of the merits of the underlying claims.

Indeed, courts describe a typical fact pattern in such a way as to make the outcome clear that employers need not endure the following types of employees.

In *Brieland v. Advance Circuits, Inc.*, the district court granted the employer's motion for summary judgment on claims brought by an employee diagnosed with major depression and schizoid personality disorder.[170] The employee had repeated altercations with co-workers in which he "blew up" at or "flipped . . . off" other employees.[171] On one occasion he called a co-worker an "asshole," and there was evidence of other outbursts in violating the defendant's policy against "offensive behavior and violence" in the workplace.[172] The employer eventually suspended the plaintiff due to his alleged violation of the policy and after an incident of "uncontrolled anger."[173] The court concluded that the plaintiff was not disabled within the meaning of the ADA and specifically rejected his assertion that he was disabled in his ability to have "normal social interactions with others."[174] Similarly, the court rejected plaintiff's claims that the defendant regarded him as disabled or that, if he were disabled, that it failed to provide him reasonable accommodations.[175] It noted that the ADA does not require the defendant to ignore plaintiff's misconduct.[176]

In *Schmidt v. Delta Airlines*, the district court granted the employer's motion for summary judgment on claims brought by a sales reservation agent who was diagnosed with obsessive-compulsive personality disorder, explosive personality, anxiety, depression, and adjustment disorder.[177] In response to his supervisors' repeated complaints regarding lateness, poor productivity, and "manipulating" his telephone to block incoming calls, the plaintiff created a scene at the office in front of several supervisors and co-workers that included "ranting . . . yelling, waving his arms, and demanding witnesses."[178] He was terminated shortly thereafter.[179] The district court easily con-

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170 Brieland v. Advance Circuits, Inc., 976 F. Supp. 858 (D. Minn. 1997).

171 *Id.* at 860–61.

172 *Id.*

173 *Id.* at 861.

174 *Id.* at 863.

175 *Id.* at 864.

176 *Brieland*, 976 F. Supp. at 865.

177 Schmidt v. Delta Airlines, No. 3:99-CV-0772-G, 2001 U.S. Dist. LEXIS 7693 (N.D. Tex. June 8, 2001).

178 *Id.* at *8.

179 *Id.* at *2 n.1.

cluded that Delta demonstrated that the plaintiff was not a "qualified individual with a disability"[180] since he could not perform the essential functions of his job and his proposed "accommodations" were unreasonable.[181] Moreover, the court found no evidence that Delta fired plaintiff because of his disability, although it may have terminated him due to misconduct resulting from his disabilities.[182]

In *Vosatka v. Columbia University*, the district court granted the university summary judgment in a case where the university did not reappoint a tenure-track faculty member who made several sexual comments, offensive jokes, and false and "bizarre allegations" that a senior colleague assaulted another faculty member and stole morphine to inject into a neighbor.[183] The university ordered him to submit to a psychological examination due to such "erratic behavior."[184] The examining psychologist concluded that plaintiff was "not impaired by any major mental illness, and he is cognitively and emotionally able to return to work," but that he had "maladaptive personality traits" that were likely to significantly cramp his social functioning."[185] Since the report did not characterize the plaintiff as "mentally impaired," the court concluded that no reasonable jury could find that the university regarded plaintiff as disabled based upon such an evaluation.[186]

In *Madonia v. Mavo Leasing, Inc.*, a company supervisor testified concerning the abrasive character of the employee.[187] On one occasion, the plaintiff approached the supervisor and, without provocation stated, "You know, you fucking assholes. You just want to fuck with me. Why do you fuck with me all the time?"[188] On another occasion,

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180 The defendant did not dispute that the plaintiff was disabled. *Id.* at *14.

181 *Id.* at *16–*20.

182 *Id.* at *23.

183 Vosatka v. Columbia Univ., No. 04 Civ. 2936(LAP), 2005 WL 2044857 at *3 (S.D.N.Y. Aug. 25, 2005).

184 *Id.* at *3.

185 *Id.* at *3, *7.

186 *Id.* at *7. The court noted a number of other decisions in which an employer's requirement that an employee obtain a medical evaluation is not sufficient to demonstrate that the employer regarded the employee as disabled. *Id. See, e.g.,* Doe v. Bd. of Educ. of Fallsburgh Cent. Sch. Dist., 63 Fed. App'x 46, 49 (2d Cir. 2003); Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 811 (6th Cir. 1999); Cody v. CIGNA Healthcare of St. Louis, Inc., 139 F.3d 595, 599 (8th Cir. 1998).

187 Madonia v. Mavo Leasing, Inc., No. 98 C 601, 2000 U.S. Dist. LEXIS 5488 (N.D. Ill. Apr. 12, 2000).

188 *Id.* at *9.

the plaintiff became extremely angry with a co-worker and then began calling several managers "assholes" and "sons of bitches."[189] On another occasion, the plaintiff confronted a co-worker who had interrupted the plaintiff during a phone call and threatened the co-worker if he ever "fucked with me or fucked with the telephone while I was using it, I would pound his fucking face into the concrete."[190] The plaintiff had been diagnosed with depression and an otherwise unspecified personality disorder.[191] The district court found there was a genuine issue of fact as to whether the plaintiff was perceived to be disabled and whether he was "otherwise qualified."[192] It nonetheless granted summary judgment to the defendant-employer since the plaintiff failed to remain in treatment for his medical conditions as promised, a condition for continuing his employment after these outbursts.[193]

In *Lassiter v. Reno*, the district court dismissed a claim by a discharged federal marshal diagnosed with paranoid delusional personality disorder.[194] The court concluded that the defendant had demonstrated that having a diagnosis of *any* "mental instability or history of a basic personality disorder" disqualifies the plaintiff from the position pursuant to United States Marshal Service "medical qualifications" regarding who may carry firearms.[195] Since the plaintiff was precluded from carrying a firearm, he could not perform the essential functions of a marshal nor be reasonable accommodated since there were no available administrative positions.[196]

In *Mazzarella v. U.S.P.S.*,[197] a decision applying the Rehabilitation Act,[198] the court used the same approach adopted in the above ADA cases. The district court entered summary judgment for the defendant on disability discrimination claims brought by a former

189 *Id.* at *9.

190 *Id.* at *3–*4.

191 *Id.* at *6.

192 *Id.* at *29–*32.

193 *Madonia*, 2000 U.S. Dist. LEXIS 5488 at *43.

194 Lassiter v. Reno, 885 F. Supp. 869 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996).

195 *Lassiter*, 885 F. Supp. at 874.

196 *Id.* at 874–75.

197 849 F. Supp. 89 (D. Mass. 1994)

198 The ADA does not apply to the executive branch of the federal government itself, so federal employees must bring claims under the Rehabilitation Act. 29 U.S.C. § 794 (1982). While there are distinctions between the two laws, they are not implicated for purposes of the scope of this Article.

employee (referred to as a "disabled veteran") with "Explosive Personality Disorder."[199] The employee became overwhelmed with his work assignments and, when he went to his supervisor's office to obtain a slip to go to the medical office, he began "screaming obscenities" and "tear[ing] apart the office."[200] The court concluded that this outburst rendered the plaintiff unable to perform the essential functions of his job, and there was no reasonable accommodation that would enable him to do so.[201]

Thus, contrary to the terror-invoking predictions of commentators who urged the elimination of persons with personality disorders from the ADA's scope to protect American workplaces, the statute has not compelled employers to tolerate chaotic, turbulent workplaces.[202] Courts have essentially removed the potential sources of chaos and turbulence from the ADA's protection on a case-by-case basis.[203]

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199 *Mazzarella*, 849 F. Supp. at 92.

200 *Id.* at 93–94.

201 *Id.* at 95. In another Rehabilitation Act case, Adams v. Alderson, 723 F. Supp. 1531 (D.D.C. 1989), the district court granted summary judgment to the employer. The summary judgment record apparently was unclear regarding the plaintiff's type of mental illness. *Id.* at 1531. The complaint alleged "adjustment disorder with mixed disturbance of emotion and conduct," and a "compulsive personality disorder." *Id.* The medical evidence indicated that the plaintiff was hospitalized for two weeks shortly after the incident that led to his firing—"violent physical assault upon a female supervisor . . . followed by a rampage through the office damaging or destroying office equipment." *Id.* However, the plaintiff's treating psychiatrist did not describe his condition in DSM diagnosis terms, but stated that the plaintiff had a "maladaptive reaction to a psychosocial stressor" (referring to the "antagonizing supervisor" he assaulted). *Id.* The court concluded that this reaction was "hardly an 'impairment'" within the meaning of the ADA's requirements. *Id.* Even if he had an impairment, the court reasoned, "one who is unable to refrain from doing physical violence to the person of a supervisor, no matter how unfair he believes the supervision to be, or how provocative its manner, is simply not otherwise qualified for employment." *Id.* at 1532.

202 Indeed, in at least one case, a plaintiff's reliance upon a personality disorder diagnosis rendered his claim more vulnerable to dismissal. The Commonwealth Court of Pennsylvania rejected a plaintiff's disability discrimination claims under the state nondiscrimination statute based upon the diagnosis's nature. Sch. Dist. of Phila. v. Friedman, 507 A.2d 882, 885–86 (Pa. Ct. App. 1984). The plaintiff's own treating psychiatrist testified that the plaintiff had a personality disorder and noted, on cross-examination by the employer's counsel, "I'm not sure any of us are spared that diagnosis." *Id.* Based on that concession, the court concluded that plaintiff did not have a disability and reversed the lower court's ruling in favor of the employee. *Id.* at 886. The dissent noted that the plaintiff had been in psychiatric treatment for many years and that he had substantial limitations in his life activities since his condition caused him to be chronically late. *Id.* at 888–89.

203 *DiBenedetto v. City of Reading* is one of the few cases in which a plaintiff's claims survived a defendant's pretrial motion. No. 96-CV-5055, 1998 U.S. Dist. LEXIS 11804 (E.D. Pa. Jul. 16, 1998). Nonetheless, it exemplifies the challenge presented by the nebulous quality of

4. *Defendants' Successful Strategies for Eliminating "Personality" from the ADA's Reach*

Clearly, the case law reveals that persons with actual or perceived personality disorders struggle to have their ADA claims vindicated in court. How has this occurred? While most of these plaintiffs failed to establish that they were "qualified individuals with a disability," courts have not adopted a single approach to arrive at this conclusion. Depending upon the record evidence and the presentation of the disputed legal issues, courts have halted discrimination claims based on "personality" issues using a number of different means.

a. *Excluding Social Interaction as a "Major Life Activity" Under the ADA*

The first step towards meeting the ADA's definition of disability is establishing that one has a physical or mental impairment.[204] Courts rarely reject claims based upon this requirement since they generally assume for analysis purposes that the plaintiff's given condition suffices as an "impairment" under the ADA.

The requirement that plaintiff's impairment "substantially limits one or more of the major life activities of such individual"[205] presents the first true test for the plaintiff's claim. As seen in *Brieland*, the most significant limitations for persons with personality disorders arise in the area of social functioning. Most courts simply reject "interacting with others" and similar concepts as being an appropriate "major life activity" under the ADA's definition of disability. This approach runs contrary to that urged by the EEOC. In its Enforcement Guidance, the EEOC asserted that an individual's "ability to interact with others" may be a major life activity for purposes of

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diagnoses assigned to individuals with personality disorders. The district court found that there was an issue of fact regarding whether the plaintiff was "disabled" due to the conflicting medical evidence about his condition. *Id.* at *41. He was initially diagnosed with major anxiety syndrome, and after having a violent altercation with a female suspect and a verbal altercation with a supervisor in which he shouted obscenities and vulgarities, an evaluating psychologist concluded that the plaintiff had "a large amount of personality turmoil" and a "schizoid personality." *Id.* at *4–*8. A psychiatrist then diagnosed him with Attention Deficient Disorder and an "Axis II Personality Disorder, with obsessive paranoid and impulsive type features." *Id.* at *11. These findings were partially contradicted by a treating psychiatrist, who found that the plaintiff only suffered from Attention Deficit/Hyperactivity Disorder. *Id.* at *15–*17.

204 42 U.S.C. § 12102(2)(A) (2000).

205 *Id.*

determining the presence of a substantial limitation.[206] The agency reasoned:

> An impairment substantially limits an individual's ability to interact with others if, due to the impairment, s/he is significantly restricted as compared to the average person in the general population. Some unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to establish a substantial limitation in interacting with others. An individual would be substantially limited, however, if his/her relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.
> These limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.[207]

Such an approach suggests that persons experiencing difficulties with social functioning that rise to the level of a personality disorder diagnosis could demonstrate a substantial limitation in this major life activity under the ADA. However, the Enforcement Guidance has provided little support for such claims. While a few courts have followed the EEOC's position, most notably the Ninth Circuit,[208] a significant number have refused to consider "interacting with others" to be a major life activity in itself.[209] The *Brieland* court, for example, acknowledged that the EEOC listed "interacting with others" as a major life activity in its Compliance Manual,[210] but noted that the manual was "not binding."[211] As several commentators have observed, this trend presents a significant barrier to the claims of persons with mental illness who can eat, walk, talk, and breathe without

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206 *Enforcement Guidance*, *supra* note 106, Question 9.

207 *Id.*

208 Head v. Glacier Northwest, 413 F.3d 1053, 1060 (9th Cir. 2005) (holding that interacting with others is a major life activity); McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999) (holding that interacting with others is a major life activity because it "is an essential, regular function, like walking and breathing").

209 *See, e.g.*, Davis v. Univ. of N.C., 263 F.3d 95, 101 n.4 (4th Cir. 2001) (confessing "some doubt" as to whether the ability to get along with others is a major life activity); Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997) (calling the ability to get along with others a "remarkably elastic" notion, making it "unworkable as a definition" and distinguishing the notion from breathing or walking).

210 Brieland v. Advance Circuits, Inc., 976 F. Supp. 858, 863 (D. Minn. 1997) (quoting EEOC Compliance Manual § 902.3).

211 *Id.*

difficulty but for whom normal social functioning is all but impossible.[212]

In *Jacques v. DiMarzio, Inc.*, the Second Circuit's examination of whether and when "interacting with others" can be a major life activity, demonstrates how notions of personality and illness are inextricably bound together in the resolution of the question.[213] Purportedly declining to follow either of the two lines of cases, the Second Circuit concluded that "interacting with others" could be a major life activity, but it rejected the Ninth Circuit's EEOC Enforcement Guidance-based approach to the substantiality requirement.[214]

In expounding the substantiality requirement, the Ninth Circuit emphasized that to recognize the "interacting with others" notion as a major life activity would not allow "any cantankerous person" to prove at law that he or she was "substantially limited" in a major life activity.[215] Rather, the test for substantiality requires the factfinder to determine whether the impairment is regularly characterized by "'consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.'"[216]

The *Jacques* court rejected this approach as "unworkable, unbounded, and useless as guidance to employers, employees, judges, and juries."[217] The court regarded the Ninth Circuit's demarcation between hostile and cantankerous persons as having no basis in reality.[218] The Second Circuit opted for a much narrower application of "interacting with others"; a plaintiff demonstrates a substantial limitation if he or she has a "mental or physical impairment [which] severely limits the fundamental ability to communicate with others."[219] A plaintiff must show actual social "isolation" based upon a "severe con-

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212 *See* Wendy F. Hensel, *Interacting With Others: A Major Life Activity Under The Americans With Disabilities Act?*, 2002 WIS. L. REV. 1139; Bryan P. Stephenson, *Comment: I'm So Lonesome I Could Cry . . . But Could I Sue?: Whether "Interacting With Others" Is a Major Life Activity Under the ADA*, 31 PEPP. L. REV. 773 (2004); Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997 (2004); Mark DeLoach, Note, *Can't We All Just Get Along?: The Treatment of "Interacting with Others" as a Major Life Activity in the Americans with Disabilities Act*, 57 VAND. L. REV. 1313 (2004).

213 Jacques v. DiMarzio, Inc., 386 F.3d 192 (2d Cir. 2004).

214 *Id.* at 201–03.

215 McAlindin v. County of San Diego, 192 F.3d 1226, 1235 (9th Cir. 1999).

216 *Jacques*, 386 F.3d at 203 (quoting *McAlindin*, 192 F.3d at 1235).

217 *Jacques*, 386 F.3d at 202.

218 *Id.*

219 *Id.*

dition."[220] The court explained that it sought an approach that would not "frustrate[ ] the maintenance of a civil workplace environment."[221] Echoing the concerns raised a decade earlier by employers and their attorneys, the court reasoned: "The more troublesome and nasty the employee, the greater the risk of litigation costs for an employer that disciplines or fires him.[222] All things being equal, a 'cantankerous' person or a curmudgeon would be more secure by becoming more unpleasant."[223]

While the plaintiff in *Jacques* had not been diagnosed with a personality disorder,[224] the appeals court's description of her resembled that of the plaintiffs in the "personality disorder cases" described above:

> [The plaintiff is described] as a "problem employee": she was prone to "[c]onfrontations with co-workers, . . . intolerance of [ethnic minorities in the] production department, [and] [e]motional problems in dealing with supervisory staff"; she was the "most confrontational person we have ever employed"; her supervisors and coworkers felt obliged to treat her with "kid gloves." The statement further explained that Mr. DiMarzio, in firing Jacques, "saw no reason why his supervisory staff should be forced to make such an extreme effort to tiptoe around and cater to someone who was emotionally unstable."[225]

After a jury returned a verdict in favor of a person with such a "personality," it is unsurprising that the appeals court fashioned a standard to prevent a similar result on retrial. The *Jacques* court admittedly

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220 *Id.* One court applied this approach to a case brought by a man with Tourette's Syndrome who contended that he was substantially limited in his interactions with others because of their reactions to his tics. Bell v. Gonzales, 398 F. Supp. 2d 78, 82–83 (D.D.C. 2005). In language that could describe someone with a mental illness, the plaintiff offered evidence that "people often regard him as 'strange,' and co-workers have often misinterpreted his words, gestures, and behaviors as rude, dismissive, aggressive, nasty, and controlling." *Id.* at 89. Reasoning that the plaintiff had no difficulty communicating in "an objective mechanical sense," and therefore his impaired social functioning is "not encompassed by the basic definition of interacting with others" set forth by the *DiMarzio* court, the court granted the defendant summary judgment on this issue. *Id.* at 89, 100.

221 *Jacques*, 386 F.3d at 203.

222 *Id.*

223 *Id.*

224 *Id.* at 195–96. The plaintiff claimed her primary disabling condition to be bipolar disorder.

225 *Id.* at 197.

based its new standard on the judges' perception of workplace harmony, as opposed to any reasoned understanding of disability or mental illness.[226]

b. *Including Social Interaction as an "Essential Function" of the Job*

Even when a plaintiff with personality disorders succeeds in demonstrating a substantial limitation in a major life activity, it is unlikely that she will establish that she is a *qualified* individual with a disability. A "qualified" individual is one who, despite her disability, can still perform the essential functions of her job. A person who cannot perform all of the essential functions of his or her job is not a "qualified individual with a disability," and is therefore excluded from the ADA's protections.[227] Similarly, employers cannot be compelled under the ADA to eliminate an essential function of a position to accommodate to a disabled employee; such "accommodation" is considered "unreasonable" per se.[228]

The ADA gives employers broad discretion to define essential functions.[229] *Schmidt*, *Lassiter*, and *Mazzarella* reveal that characterizing the job's "essential functions" to eliminate persons with mental illness and/or personality disorders legitimizes an employer's defense that it was maintaining workplace harmony.[230] When courts permit businesses to include "getting along with co-workers" as an essential job function, anyone with an impaired or limited ability to do so,

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226 *Id.* at 203.

227 42 U.S.C. § 12111(8) (2000).

228 Moritz v. Frontier Airlines, 147 F.3d 784, 788 (8th Cir. 1998).

229 42 U.S.C. § 12111(8) ("For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."). *See also* 29 C.F.R. app. § 1630.2(n); Albertson's, Inc. v. Kirkenburg, 527 U.S. 555, 579–80 (1999).

230 *See, e.g.*, Grenier v. Cyanamid Plastics, Inc. 70 F.3d 667, 670–71 (1st Cir. 1995). The court reviews case law to demonstrate that "essential requirements of a job" involve, in addition to technical skills and experience, mental and emotional stability, the ability to get along with others, the ability to follow instructions, and the ability to handle pressures of the job and learn specialized tasks. *Id.* at 674–75. *See also* Gilday v. Mecosta County, 124 F.3d 760, 765 (6th Cir. 1997) ("The ability to get along with co-workers and customers is necessary for all but the most solitary of occupations."); Misek-Falkoff v. IBM Corp., 854 F. Supp. 215, 227 (S.D.N.Y. 1994) ("It is certainly a 'job-related requirement' that an employee, handicapped or not, be able to get along with co-workers and supervisors.").

regardless of the reason or etiology,[231] becomes categorically "unqualified" for the job. Ironically, most courts have declined to find "interacting with others" to be a major life activity for the purposes of meeting the definition of disability.[232] This quandary is a primary reason why persons with mental illness are seen as being all but written out of the ADA entirely.[233]

c. Limiting the Scope of the "Regarded As" Disabled Prong

At first blush, one might conclude that using the third prong of the ADA's definition of disability, which extends the statute's protection to persons "regarded as" disabled, would be the most useful approach for persons with personality disorders. Society's pathologization of disfavored personalities, as evidenced by the ever-expanding list of DSM Axis II diagnoses, suggests that society regards those with personality disorders as disabled. However, plaintiffs with personality disorders who primarily rely on a "regarded as" approach, such as the plaintiffs in *Pouncy* and *Vosatka*, fare no better than plaintiffs who claim to be actually disabled.

Courts' construction of the "regarded as" prong has created nearly insurmountable barriers for plaintiffs claiming injury under this theory, regardless of the particular kind of "perceived disability."[234] To prevail, a plaintiff must demonstrate that his or her employer regarded her as "disabled" as the ADA defines the term. Specifically, this means that to survive summary judgment, a plaintiff must provide record evidence that his or her employer actually thought that the

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231 The defendant in Lassiter v. Reno, discussed *supra* at notes 194–96 and accompanying text, had a broad and blatant requirement: it was an essential function of the job to be free from *any* mental impairment or personality disorder. 885 F. Supp. at 875.

232 *See supra* Part II.B.4.

233 Hensel notes:

> Plaintiffs are thus placed in an unenviable Catch-22: if they are disabled, they are not qualified, and if they are qualified, they are not disabled. It is ironic that courts continue to conclude that interacting with others is not a major life activity, while at the same time finding it is an essential function of virtually every job. Because the ADA was promulgated with the express purpose of enabling people with disabilities to become productive members of society and secure and maintain employment, this result is both untenable and intellectually unsound.

Hensel, *supra* note 212, at 1188–89.

234 Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997) (criticizing the restrictive interpretation of the "regarded as" prong of the ADA prevalent among federal courts).

plaintiff was *substantially* limited in a major life activity.[235] To the extent that a plaintiff claims that he or she is limited in the major life activity of "working," the plaintiff must prove that his or her employer regarded him or her as disabled in a "broad range of jobs," not only the specific job in question.[236] As a practical matter, such evidence is nearly impossible to obtain. An employer may openly assert that he wants a workplace free of "crazies" and may fire anyone with a psychiatric diagnosis, but unless the plaintiff provides evidence that the employer subjectively believed that the plaintiff was *substantially* limited in a *particular* major life activity (in most jurisdictions it must be an activity *other* than interacting with others), the plaintiff will not prevail on the discrimination claim under the "regarded as" approach.[237]

The "regarded as" prong's limited reach may be seen in personality disorder cases as well. In *Lynch v. Lee*, the district court denied plaintiff's motion for summary judgment after concluding that there were issues of fact regarding whether the plaintiff, who was diagnosed with "personality disorder and paranoia," was actually or regarded as disabled.[238] The court noted that the record could also support a finding that the plaintiff "simply was seen as an employee who was bringing too many personal problems into the office and as a result was a detriment to the workings" of the office.[239] In *Duncan v. Wisconsin Department of Health*,[240] a counselor with "anger control" problems challenged his termination claiming that he was "regarded as" having a personality disorder.[241] The court of appeals affirmed the trial court's conclusion that the plaintiff failed to demonstrate that his employer regarded him as disabled from a broad range of positions.[242]

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235 *See, e.g.*, Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 153–54 (2d Cir. 1998).

236 *See, e.g.*, Ryan v. Grae & Rybicki, P.C., 135 F.3d 867, 872–73 (2d Cir. 1998).

237 *See* Jamie C. Ray & Stephen S. Pennington, *The Substantial Limitation Approach to Defining Disability: Why Does It Create an Insurmountable Barrier to Individuals Who are Regarded as Disabled?*, 9 TEMP. POL. & CIV. RTS. L. REV. 333 (2000).

238 Lynch v. Lee, No. 00-1435 § K4, 2004 U.S. Dist. LEXIS 16906 (E.D. La. Aug. 18, 2004).

239 *Id.* at *11.

240 166 F.3d 930 (7th Cir. 1999).

241 *Id.* at 933, 935.

242 In an unusual case from the Northern District of Ohio, Palmer v. Ford Motor Co., No. 1:03 CV 430, 2004 U.S. Dist. LEXIS 28073 (N.D. Ohio Apr. 22, 2004), *aff'd*, 134 Fed. App'x 887 (6th Cir. 2005), a plaintiff brought a disability discrimination claim arising from his employer's alleged perception of him as mentally ill. The plaintiff had ongoing and serious problems working with others and evaluations conducted for the employer yielded diagnoses that included

5. *The Courts' Creation of Safe Harbors for Employers*

Cases brought by individuals with personality disorder diagnoses exemplify what Emens refers to as the "hedonic costs" implicated in discrimination against people with mental illness.[243] At first blush, an employer's desire to avoid the "hedonic costs" associated with having a person with a mental illness in the workplace appears to be a classic case of discriminatory animus (i.e., wanting to avoid certain kinds of people). However, Emens argues that the "emotional contagion" from mental illness differs from "classic animus" in that typically there is no "hostility towards people with mental illness, at the categorical level or the individual level."[244] Because avoiding such costs is seen as a "reasonable act of self-preservation," the courts view this type of employment discrimination as "rational," which accounts for the results that almost entirely favor the employer-defendants.[245]

Further, the typical solutions proposed for employment discrimination (i.e., integration-based approaches to lessen the "stigma" associated with certain conditions by increasing others' contact with individuals possessing such conditions), may do little to stem the occurrence of such actions (and the resulting "emotional contagion" may have the opposite result), rendering discrimination against persons with mental illness especially difficult to eradicate.[246] One of the

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"severe personality disorder with paranoid elements and narcissistic elements." *Id.* at *1. The plaintiff contended that he was not disabled but that Ford incorrectly regarded him as such. *Id.* at *3. The trial court entered summary judgment for the employer since there appeared to be no "mistake" in Ford's conclusion that the plaintiff had a mental illness, and, in any event, the plaintiff had not demonstrated that Ford took any adverse employment action against him. *Id.* at *4–*5.

243 Emens, *supra* note 48, at 401.

244 *Id.* at 443. *See also* Alexander v. Choate, 469 U.S. 287, 295 (1985) ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.").

245 *See generally* Samuel R. Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923 (2004) (explaining that one reason court decisions have restricted, rather than expanded, the ADA's reach as compared with other civil rights laws is that the Supreme Court regards employers' actions toward disabled employees as "rational" conduct, rather than "intentional" discrimination). Of course, a related explanation for the overwhelming results in favor of employers is that the stigma of mental illness is so pervasive in our society that even federal judges are not immune, and they accordingly refuse to extend nondiscrimination protection to people with mental illness in employment cases.

246 Emens, *supra* note 48, at 445. *See also* Teresa L. Schied, *ADA and Employment of Those With Mental Disabilities*, *in* EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 152–53 (Peter David Blanck ed., 2000).

underlying assumptions of employment discrimination laws is that discrimination results in part due to incorrect and ignorance-based assumptions and prejudices of the capabilities of members of certain minority groups (such as women, African-Americans, or older workers). Thus, compelled integration of the protected minority in the workplace presumably leads to greater understanding and appreciation of the true abilities of such individuals. However, if the nature of a person's minority status is that she is disabled in social functioning, as is the case for many persons with mental illness, it may be less likely that her co-workers and employers will gain such understanding and appreciation through increased contact with her.[247]

Therefore, regardless of the central question a particular case poses (whether it is the definition of disability or the essential functions of the job), courts have created a comfortable safe harbor for employers who address the "hedonic costs" of having employees with personality disorders through termination and other adverse employment actions against these employees. In very few cases do employees with actual or perceived personality disorders survive the early stages of an ADA claim.

While the fact patterns and legal analyses of cases involving workers with actual or perceived personality disorders may make basic sense in terms of the outcomes, they mask the more complicated issue of how we regard disfavored personalities and mental illness under the law. Courts appear confident that they have not condoned discrimination based on mental illness by finding in favor of employers in the relevant ADA cases because the cases implicate only "personality issues" and not true disabilities. Courts have used the dichotomy to both reject "interacting with others" as a major life activity and to permit employers to define a job's essential functions to exclude people with impaired social functioning. Further, the "regarded as" prong's constricted view of the definition practically dooms the claims brought by those with apparently impaired personalities. By halting such claims at the claim's definitional stage—where the plaintiff is essentially "classified" for statutory purposes—courts

247 Emens, *supra* note 48, at 445–46 (discussing the limited reach of the "contact hypothesis," which assumes that "increasing contact between members of stigmatized groups and outsiders will decrease the stigma attributed to those groups by the outsiders," for decreasing discrimination against people with mental illness in the workplace).

evade the more complex issue of how society must, if at all, accommodate those whose personalities it has labeled as disordered.[248]

III. PERSONALITY SCREENING UNDER THE ADA

As the fact patterns of some of the cases discussed above suggest, employers will likely embrace a mechanism that enables them to screen out troublesome prospective employees at the hiring stage. Thus, courts have also attempted to distinguish between personality traits and mental illness under the ADA when analyzing claims challenging the administration of so-called "personality tests" in the workplace. The central issue implicated in these cases is a determination of whether the employer is using a test to reveal mental illness, which the ADA expressly prohibits, or merely to uncover undesirable personality traits in an applicant or employee. Unsurprisingly, courts have been unable to reach a consensus on the proper judicial test to determine the employer's motives in administering the test in any given case.

A. The Development of Personality Testing

The history of psychological testing and personality screening closely tracks that of mental illness diagnosis and classification discussed above. Personality testing originated in hospital settings to classify patients.[249] In the early- to mid-twentieth century, doctors were followed by the "corporate and government bureaucrats, with their need to sort and manage large groups of people."[250] Several different tests were developed with the aim of approximating an "X-ray of the personality."[251] However, in some respects, these tests reveal more about the developers' and users' own perceptions and goals.[252]

As writer Annie Paul notes in her recent critique of personality testing: "Today, personality tests are a startlingly ubiquitous part of American life, from the thousands of quizzes popping up on-line, to the personality types assigned in seminars and workshops, to the hon-

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248 *See* Feldblum, *supra* note 107, at 164 (arguing that courts should employ a broad over-inclusive view of "disability," and "expend their energy remedying real cases of discrimination and dismissing non-meritorious cases on the basis of their lack of merit").

249 PAUL, *supra* note 6, at 47–48.

250 *Id.* at 206.

251 *Id.* at 221.

252 *Id.* at 226 (citing Joseph Masling in THE SIXTH MENTAL MEASUREMENTS YEARBOOK 495 (Oscar Buros ed., 1965)).

esty tests and personality screens routinely required of job applicants."[253] A 2003 survey of 1,149 American businesses revealed that 30% of employers administer personality tests to current and prospective employees.[254] The chief executive officer of a corporate testing company rationalized the widespread use of such devices as follows:

> In light of the struggling economy, the makeup of a manager's personality is more important than ever, especially his or her ability to handle the stress of meeting profit targets. . . . Companies are pushing hard right now to turn the economic corner. An executive candidate who seems qualified in every way except for a red flag on a personality test may be viewed by a prospective employer as not the right fit for corporate culture shaped around instant productivity.[255]

Eighty-nine of the Fortune 100 companies administer the Myers-Briggs Type Indicator to their employees to categorize each employee as one of sixteen personality "types."[256] While this type of testing in the workplace is not a new phenomenon and many employers view the development and use of these tests as a valuable approach to managing "human resources," other see personality testing as employer overreaching.[257]

The Minnesota Multiphasic Personality Inventory (MMPI), one of the most widely-used personality screening tests, appears to have spawned the most litigation.[258] In 1942, a psychologist and psychiatrist at University of Minnesota developed it to classify patients in the Uni-

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253 PAUL, *supra* note 6, at xi. For example, several websites offer free tests designed to identify, not *whether* you have a personality disorder, but *which* one specifically best fits your personality. *See, e.g.*, http://www.blogthings.com/personalitydisorderquiz/; http://quizilla.com/users/rosiekins/quizzes/Which%20Personality%20Disorder%20Do%20You%20Have%3F/; http://selectsmart.com/FREE/select.php?client=disorders; http://similarminds.com/personality_disorder.html (last visited Sept. 21, 2006).

254 Business Editors, *Drug Testing a Prominent Part of the Hiring Process; Most Employers Now Ask Job Candidates to Consent to Testing, According to National Survey by Leading Recruiter*, Business Wire, Apr. 30, 2003.

255 *Id.* (quoting Allen Salikof, President and CEO of Management Recruiters International).

256 PAUL, *supra* note 6, at xiii (citing *CPP Celebrates 60th Anniversary of Myers-Briggs Assessment*, PR Newswire, Oct. 28, 2003).

257 PAUL, *supra* note 6, at 117 ("Is the individual's innermost self any business of the organization's? In return for the salary that the Organization gives the individual, it can ask for superlative work from him, but it should not ask for his psyche as well.") (quoting William Whyte, The Organization Man 201 (1956)).

258 *See infra* notes 288–350 and accompanying text.

versity's inpatient mental health hospital.[259] To determine "normal" behavior, the test designers surveyed an all-white, mostly-Protestant group of 724 Minnesotans, which served as "psychology's major benchmark of normality for the next fifty years."[260] Acknowledging that its original form was geared towards attitudes that have time and place limits, developers of the MMPI updated the test by releasing the MMPI-2 in 1989.[261] However, the majority of questions remain unchanged.[262] Today, it is used in many employment settings including 60% of police departments nationwide.[263]

The form of MMPI or MMPI-2 discussed in the ADA cases[264] is an examination written for a sixth-grade reading level, which consists of several hundred true-false questions including several addressing the test-takers' religious beliefs,[265] sexuality,[266] and political atti-

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259 PAUL, *supra* note 6, at 47–48.

260 *Id.* at 51–52.

261 *Id.* at 69–70.

262 MILLON, MASTERS OF THE MIND, *supra* note 40, at 573. The revised version used a "sample more representative of the U.S. population . . . to re-norm the MMPI-2." *Id.*

263 PAUL, *supra* note 6, at 63. One psychologist-commentator has observed: "The MMPI-2 is based on extensive peer-reviewed and published research and compares a test subject's individual scores with data from both normative samples and several clinical samples. Multiple studies over long periods of time has established reasonable and acceptable levels of validity and reliability for the MMPI-2, and it remains a robust and widely used assessment tool in both clinical and forensic settings." David Mendoff, *The Scientific Basis of Psychological Testing: Considerations Following* Daubert, Kumho, *and* Joiner, 41 FAM. CT. REV. 199, 208 (2003).

264 Additional revisions have been made to the MMPI-2, largely in the "scales" used to map the results. The nine "Restructured Clinical Scales" include: Demoralization; Somatic Complaints; Low Positive Emotions; Cynicism; Antisocial Behavior; Ideas of Persecution; Dysfunctional Negative Emotions; Aberrant Experiences; Hypomanic Activation. *See* Description by the Publisher of the MMPI-2, Pearson Assessments, *available at* http://www.pearsonassessments.com/tests/mmpi2rcscales.htm (last visited Nov. 26, 2006).

265 For example, one court noted the following questions on the MMPI-2:

67. I feel sure that there is only one true religion. . . .
201. I have no patience with people who believe there is only one true religion. . . .
477. My soul sometimes leaves my body. . . .
483. A minister can cure disease by praying and putting his hand on your head. . . .
486. Everything is turning out just like the prophets of the Bible said it would. . . .
505. I go to church almost every week.
506. I believe in the second coming of Christ. . . .
516. I believe in a life hereafter. . . .
578. I am very religious (more than most people) . . . .
580. I believe my sins are unpardonable. . . .
606. I believe there is a God. . . .
688. I believe there is a Devil and a Hell in afterlife.

Soroka v. Dayton Hudson, 1 Cal. Rptr. 2d 77 (Cal. Ct. App. 1991).

266 For example:

137. I wish I were not bothered by thoughts about sex. . . .

tudes.[267] The answers result in scores on ten clinical scales: 1) hypochondriasis; 2) depression; 3) hysteria; 4) psychopathic deviate; 5) masculinity-femininity; 6) paranoia; 7) psychasthenia;[268] 8) schizophrenia; 9) hypomania; and 10) social introversion.[269] Results are referred to by elevations on specific scales; thus, a "2-4" result refers to elevated score on the 2d (depression) and 4th (psychopathic deviate) scales.

As acknowledged above, another widely-administered personality test in workplaces is the Myers-Briggs Type Indicator. This test is based upon Carl Jung's theory of psychological "types," with eight specific categories of traits (introverted/extroverted, intuiting/sensing, thinking/feeling, and judging/perceiving).[270] The answers to the forced choice questions result in a score in each trait pair and a classification as one of sixteen possible "types."[271] Other tests with less widespread use in the workplace include Cattell's Sixteen Personality Factor Questionnaire, the PASS-III D.A.T.A. Survey, the Millon Clinical

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290. I have never been in trouble because of my sex behavior. . . .
339. I have been in trouble one or more times because of my sex behavior. . . .
466. My sex life is satisfactory. . . .
492. I am very strongly attracted by members of my own sex. . . .
496. I have often wished I were a girl. (Or if you are a girl) I have never been sorry that I am a girl. . . .
525. I have never indulged in any unusual sex practices. . . .
558. I am worried about sex matters. . . .
592. I like to talk about sex. . . .
640. Many of my dreams are about sex matters.

Id.

267 Other general questions include: "I am very seldom troubled by constipation"; "I love my father"; "I have no difficulty in starting or holding my bowel movements"; "Several times a week I feel as if something dreadful is going to happen"; "I wake up fresh and rested most mornings"; "There is something wrong with my sex organs"; "I like to flirt"; "I have a good appetite"; "Women should not be allowed to drink in cocktail bars"; "If the money were right, I would like to work for a circus or carnival"; "I think Lincoln was greater than Washington"; "Illegal use of marijuana is worse than drinking liquor"; "I think I would like to belong to a motorcycle club"; and "Often I feel as if there were a tight band around my head." See PAUL, *supra* note 6, at 53, 65.

268 Defined by THE AMERICAN HERITAGE DICTIONARY as "A psychological disorder characterized by phobias, obsessions, compulsions, or excessive anxiety. No longer in scientific use." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

269 *See* http://www.pearsonassessments.com/tests/mmpi_2.htm (last visited Sept. 21, 2006). The test results also include several other scales, including validity scales. Richard Niolon, *The Minnesota Multiphasic Personality Inventory 2* (http://www.psychpage.com/objective/mmpi2_overview.htm) (last visited Sept. 21, 2006).

270 PAUL, *supra* note 6, at 106–12.

271 PAUL, *supra* note 6, at 111. See also Malcolm Gladwell, *Personality Plus*, THE NEW YORKER 42, 43 (Sept. 20, 2004).

Multiaxial Inventory, and the Thematic Apperception Test, and many other tests specifically designed to test traits such as honesty and integrity.[272]

B. The ADA and Medical Examinations

In addition to the general prohibition against disability-based discrimination, the ADA imposes certain limitations on the use of "medical examinations and inquiries" in the employment setting.[273] Specifically, a prospective employer may not "conduct a medical examination or make inquiries" as to whether a job applicant has disability.[274] However, a prospective employer may inquire into an applicant's "ability to perform job-related functions."[275]

This limitation on "medical examinations," however, does not prohibit the use of a medical examination if it occurs after an offer of employment has already been extended, but before the person has started the job duties.[276] An employer may condition the job offer on the examination's results if: 1) all applicants for the position are subject to the examination; 2) an applicant's medical condition and history information is maintained in a separate manner and location and is treated as "confidential" (with a few exceptions[277]); and 3) the results are used "only in accordance with" the ADA (meaning, in a nondiscriminatory fashion).[278] Title I of the ADA also limits examinations and inquiries required of employees (that is, after hiring has taken place), except to the extent such examinations are "shown to be job-related or consistent with business necessity."[279]

What are the implications of such limitations on the widespread use of personality testing in the workplace? The answer is far from settled, precisely because the agencies and courts applying the statute

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272 *See generally* PAUL, *supra* note 6, at 96–101, 178. There are several competing personality inventory tests, designed specifically for administration in the workplace, such as the Personal Outlook Inventory, Personnel Reaction Bank, the PDI Employment Inventory, the Reliability Scale of the Hogan Personality Inventory, and the California Personality Inventory. David J. Shaffer & Ronald A. Schmidt, *Personality Testing in Employment*, Dec. 1999, *available at* http://library.findlaw.com/1999/Dec/22/130153.html#intro (last visited Sept. 21, 2006).

273 STEFAN, HOLLOW PROMISES, *supra* note 117, at 147.

274 42 U.S.C. § 12112(d)(2)(A) (2000).

275 42 U.S.C. § 12112(d)(2)(B) (2000).

276 42 U.S.C. § 12112(d)(3) (2000).

277 42 U.S.C. § 12112(d)(3)(B) (2000).

278 42 U.S.C. § 12112(d)(3) (2000).

279 42 U.S.C. § 12112(d)(4)(A) (2000).

rely heavily on the elusive distinction between mental illness and personality. The EEOC's ADA regulations state that it is unlawful to use "employment tests or other selection criteria that screen out or tend to screen out" those with disabilities on the basis of such disabilities, unless such test is job-related and consistent with business necessity.[280] In the interpretive guidance to such regulations, the EEOC specifically acknowledges that some industries select individuals because of "physical and psychological criteria," some of which may be identified through a post-offer, pre-employment examination.[281]

In 1995, the EEOC, perhaps recognizing that the statute and its regulations leave many questions unanswered about the validity of testing in particular contexts, issued a specific *Enforcement Guidance on Pre-Employment Disability-Related Inquiries and Medical Examinations* ("*Pre-Employment Testing Enforcement Guidance*").[282] Five years later, the agency released an enforcement guidance on post-hiring testing, entitled *Enforcement Guidance on Disability-Related Inquires and Medical Examinations of Employees Under the Americans with Disabilities Act*, in which it notes: "There are a number of procedures and tests employers may require that generally are not considered medical examinations, including . . . psychological tests that measure personality traits such as honesty, preferences, and habits."[283] Thus, the agency's own interpretation of the ADA's language directly implicates the illness-versus-personality dichotomy.

Since a test that *approximates* a medical exam is acceptable, even though it seeks information about physical or mental condition, the *Pre-Employment Testing Enforcement Guidance* lists seven factors to consider when determining whether a test constitutes a prohibited "medical examination": 1) whether a health care professional administers the test; 2) whether a health care professional interprets

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280 29 C.F.R. §§ 1630.10, 1630.13, 1630.14 (2000).

281 29 C.F.R. § 1630.14(b) (comment) (2000). For example, candidates for jobs in law enforcement are regularly subjected to post-offer physical and psychological testing; job offers are often rescinded if the testing shows abnormalities.

282 Equal Employment Opportunity Commission, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, Oct. 10, 1995, *available at* http://www.eeoc.gov/policy/docs/preemp.html ("Pre-Employment Testing Enforcement Guidance").

283 Equal Employment Opportunity Commission, *Enforcement Guidance: Disability-Related Inquires and Medical Examinations of Employees Under the Americans with Disabilities Act*, July 27, 2000, *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html. This document specifically refers readers to the *Pre-Employment Testing Enforcement Guidance* for additional explanation of what tests constitute "medical examinations." *Id.*

the test; 3) whether the test is designed to reveal a physical or mental health impairment; 4) whether the test is invasive; 5) whether the test measures an employee's performance of a task or his/her physiological responses to performing the task; 6) whether the test is normally given in a medical setting; and 7) whether medical equipment is used.[284] The *Pre-Employment Testing Enforcement Guidance* does not specify whether one or more factors are dispositive in the determination.

The example offered in the *Pre-Employment Testing Enforcement Guidance* demonstrates the tight line the EEOC expects employers and courts to walk when it comes to applying these factors to a pre-employment psychological test:

> Example: A psychological test is designed to reveal mental illness, but a particular employer says it does not give the test to disclose mental illness (for example, the employer says it uses the test to disclose just tastes and habits). But, the test also is interpreted by a psychologist, and is routinely used in a clinical setting to provide evidence that would lead to a diagnosis of a mental disorder or impairment (for example, whether an applicant has paranoid tendencies, or is depressed). Under these facts, this test is a medical examination.[285]

In response to the commonly asked question, "May an employer give psychological examinations to applicants?" the EEOC provides the following answer:

> Yes, unless the particular examination is medical. This determination would be based on some of the factors listed above, such as the purpose of the test and the intent of the employer in giving the test. Psychological examinations are medical if they provide evidence that would lead to identifying a mental disorder or impairment (for example, those listed in the American Psychiatric Association's most recent Diagnostic and Statistical Manual of Mental Disorders (DSM)).
>
> Example: An employer gives applicants the RUOK Test (hypothetical), an examination which reflects whether applicants have characteristics that lead to identifying whether the individual has excessive anxiety, depression, and certain compulsive disorders (DSM-listed conditions). This test is medical.

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284 *Id.*

285 *Id.*

> On the other hand, if a test is designed and used to measure only things such as honesty, tastes, and habits, it is not medical.
> Example: An employer gives the IFIB Personality Test (hypothetical), an examination designed and used to reflect only whether an applicant is likely to lie. This test, as used by the employer, is not a medical examination.[286]

Interestingly, this response is one of the few places where the ADA purportedly intersects with the DSM. The EEOC assumes a broad definition of "mental illness" since the DSM includes personality disorders among the mental disorders and impairments listed. The examples of traits that may be a valid basis for testing (and presumably employment decisions) are narrowly drawn as "honesty, tastes, and habits."[287] Therefore, the *Pre-Employment Testing Enforcement Guidance* suggests that the range of permissible psychological testing is quite limited and any test that could lead to classifying someone in terms of a mental disorder violates the ADA.

C. *Courts' Varied Approaches to Analyzing the Legality of Personality Tests Under the ADA*

In practice, the EEOC's attempts to guide the courts have failed to ensure unanimity among courts' analyses of the validity of personality testing in the workplace. Courts have not taken a consistent approach when determining whether a personality test qualifies as an impermissible "medical examination." Although the courts have adopted a more generous view of the scope of permissible psychological testing than the EEOC contemplated, they ultimately employ unsettled and inconsistent approaches.[288]

Karraker v. Rent-A-Center, Inc. illustrates the competing methods used to analyze the validity of administering the MMPI-2 in the

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286 *Id.*

287 *Id.*

288 The ADA has not been the exclusive or primary vehicle for legal challenges. Plaintiffs have attempted other legal strategies to challenge the administration of personality tests in employment. In *Soroka v. Dayton Hudson Corp.*, the court reversed denial of preliminary injunction against Target Corporation, which administered the MMPI to all security guard applicants, on the basis that plaintiffs were likely to prevail on invasion of privacy claims under the California Constitution, Fair Employment and Housing Act, and Labor Code due to the MMPI's inquiries regarding the religious beliefs and sexual orientation of applicants. 1 Cal. Rptr. 2d 77 (Cal. Ct. App. 1991).